TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 126

CHARLES E. MERRILL, PETITIONER,

vs.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CHARLES E. MERRILL, Plaintiff

vs.

JOHN L. FAHS, United States Collector of Internal Revenue for the District of Florida

COMPLAINT—Filed January 7, 1943

[fol. 2] Comes now the plaintiff, Charles E. Merrill, by his attorneys, and sues the defendant, John L. Fahs, United States Collector of Internal Revenue for the District of Florida, and alleges:

I

The plaintiff, Charles E. Merrill, is a citizen of the United States of America and is over the age of twenty-one years; plaintiff was formerly (during the year 1939) domiciled in the State of Florida and a citizen of said State but is now a citizen of the State of New York.

The defendant, John L. Fahs, is a citizen of the State of Florida, residing at Jacksonville, Florida. The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00. This action is of a civil nature and arises under the Constitution and laws of the United States, to-wit, under the Internal Revenue Code.* More specifically, plaintiff seeks recovery because of an internal Revenue (Gift) tax erroneously or illegally assessed against, imposed upon and collected from him by defendant who, at all times herein mentioned and complained of, was and still is the duly appointed, constituted and acting Collector of Internal Revenue for the District of Florida.

II

On March 7th, 1939 at Pensacola, Florida a pre-nuptial contract was made and executed by and between plaintiff

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* Sections 501(a) and 503 of the Revenue Act of 1932 (47 Stat. 245, 247, 26 U. S. C. A. Internal Revenue Acts, pp. 580, 585).

See also U. S. C. A. Tit. 26, Sec. 1000, pa. 202.

and Kinta Desmare whereby, in consideration of certain trusts agreed to be created for her by plaintiff, she relinquished all marital rights of every kind which she might acquire in plaintiff's property and estate by virtue of the contemplated marriage.

On March 8th, 1939, in reliance upon said agreement, the [fol. 3] said parties were lawfully married at said place. On May 29th, 1939, pursuant to the terms of said antenuptial agreement, plaintiff created for the said Kinta Merrill an irrevocable trust to which he forthwith transferred $300,000.00 in cash. On March 11th, 1940 (for the information of the Treasury Department) plaintiff made written report of said transaction through defendant, pointing out the fact which plaintiff here alleges to be a fact viz. that the transfer of said sum of money to the trust was for adequate and full consideration in money or money's worth within the true intent and meaning of the laws of Florida and the applicable Federal Law, Sections 501 and 503 of the Revenue Act of 1932, as amended; that such transfer, accordingly, did not constitute a taxable gift. On July 23rd, 1940 plaintiff was notified of a proposed $99,000.00 deficiency assessment against him by reason of said transaction. Thereupon plaintiff, on August 22nd, 1940, filed with defendant a protest in due form, supporting same with full and complete data showing all of the pertinent and material facts, bearing upon the transaction. Despite such protest, a gift tax of $99,000.00, together with interest of $10,540.53 was on December 22nd, 1941 assessed against plaintiff and payment thereof demanded by defendant, acting under color of his said office. On December 24, 1941 the money was paid by plaintiff to defendant, under protest, the whole aggregating $109,540.53. On September 19th, 1942 plaintiff demanded of defendant refund of the sum thus erroneously and illegally exacted and collected from him and filed with defendant a written claim for refund, in due form. On October 27th, 1942 plaintiff was notified by the Commissioner of Internal Revenue of the rejection of said claim in its entirety.

Plaintiff was thereby deprived of his property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States; and by reason of the erroneous and illegal collection of said asserted tax, de-

fendant was and became and still is lawfully indebted to plaintiff for the amount paid, with interest.

[fol. 4] Plaintiff now and hereby claims refund of said tax payment, with interest on the money, calculated at the rate of 6% per annum from date of payment, and the costs of this suit.

III

And by reason of the aforesaid matters and things plaintiff further sues defendant for $109,540.53, money heretofore to-wit, on December 24, 1941 payable by defendant to plaintiff for money received by defendant for the use of the plaintiff; also for interest thereon from said date.

Wherefore plaintiff demands judgment against defendant and claims $200,000.00 damages and costs.

Marks, Marks, Holt, Gray & Yates, Sam R. Marks, Attorneys for Plaintiff. Address: 1321 Graham Building, Jacksonville, Florida.

In United States District Court

Answer—Filed February 27, 1943

Comes now the defendant, John L. Fabs, United States Collector of Internal Revenue for the District of Florida, by his attorney, Herbert S. Phillips, United States Attorney for the Southern District of Florida, and for answer to the complaint of the plaintiff, admits, denies, and alleges as follows:

I

Admits the allegations contained in paragraph numbered I of plaintiff's complaint, save and except that portion thereof wherein it is stated, "plaintiff seeks recovery because of an internal Revenue (Gift) tax erroneously or illegally assessed against, imposed upon and collected from [fol. 5] him by defendant". Defendant specifically denies that said tax was erroneously assessed against, imposed upon, and collected from plaintiff by defendant.

II

For answer to paragraph numbered II of plaintiff's complaint, defendant admits that on March 7, 1939, at Pensa-

cola, Florida, a pre-nuptial contract was made and executed by and between plaintiff and Kinta Desmare.

Admits that on March 8, 1939, the said parties were lawfully married at said place. Admits that on May 29, 1939, plaintiff created for said Kinta Merrill an irrevocable trust to which he transferred $300,000 in cash. Admits that on July 23, 1940, plaintiff was notified of a proposed $99,000 deficiency assessment against him by reason of said transaction. Admits that plaintiff on August 22, 1940, filed a protest with the defendant. Admits that a gift tax of $99,000, together with interest of $10,540.53 was, on December 22, 1941, assessed against plaintiff and payment thereof demanded by defendant, acting under color of his said office. Admits that on December 27, 1941, and not December 24, 1941, as alleged in said paragraph, that the money was paid by plaintiff to defendant, the whole aggregating $109,540.53. Admits that on September 19, 1942, plaintiff filed with defendant a written claim for refund of the sum exacted and collected. Admits that on October 27, 1942, plaintiff was notified by the Commissioner of Internal Revenue of the rejection of said claim in its entirety.

And except as thus expressly admitted, defendant denies each and every allegation contained in said paragraph numbered II.

III

For answer to paragraph numbered III of plaintiff's complaint, defendant admits that plaintiff sues for $109,540.53, money heretofore, to-wit, on December 27, 1941, and [fol. 6] not on December 24, 1941, as alleged, paid by plaintiff to the defendant. Defendant denies, however, that the plaintiff is entitled to the refund of said sum or any other sum and affirmatively alleges that the action of the Commissioner of Internal Revenue, the assessment thereof, and the collection by the defendant collector was in all respects regular and in accord with the applicable Internal Revenue statutes and Regulations applicable thereto.

Wherefore, having fully answered, defendant prays that judgment be entered for the defendant and against the plaintiff, with costs, and all other proper relief.

H. S. Phillips, United States Attorney; Harry G. Taylor, Special Assistant.

IN UNITED STATES DISTRICT COURT

Statement of Evidence

Pursuant to notice to counsel for the respective parties, the above case came on for trial at Jacksonville, Florida, on June 18, 1943, and thereupon the following proceedings were had:

The plaintiff, by counsel, offered and there was received in evidence without objection the stipulation of facts, together with the several exhibits mentioned therein.

The plaintiff then offered in evidence copy of gift tax return filed by Mrs. Charles E. Merrill, which was received and filed in evidence as plaintiff's Exhibit L.

The plaintiff, by counsel, offered in evidence affidavit of Sam R. Marks, to the introduction of which the defendant, by counsel, objected on the ground that the matters set forth therein were immaterial. The objections were overruled and the affidavit received and filed in evidence as plaintiff's Exhibit M.

[fol. 7] The stipulation of facts received in evidence is as follows, except the caption thereof is omitted:

STIPULATION OF FACTS

It Is Hereby Stipulated and agreed by and between the parties to the above-entitled proceedings that the following facts shall be taken as true for the purpose of this action, provided, however, that this stipulation shall be without prejudice to the rights of either party to object to the introduction in evidence of any part of this stipulation on the ground of irrelevancy or immateriality or to introduce other competent and relevant evidence not inconsistent with the facts herein stipulated to be true.

I

The plaintiff, Charles E. Merrill, taxpayer herein, is a citizen of the State of New York. During the year 1939, plaintiff was a citizen of the State of Florida, having his home at Palm Beach in said State. The defendant, John L. Fahs, is and at all times material herein was the Collector of Internal Revenue for the District of Florida and a citizen of said State.

II

In this case plaintiff seeks to recover for a gift tax asserted and assessed against him by the Commissioner of Internal Revenue and collected from him by the defendant. Plaintiff asserts the tax 'o have been illegally assessed and collected. This the defendant denies and contends that the assessment was lawfully made and the collection proper. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

III

Plaintiff was born October 19, 1885, at Green Cove Springs, Florida, and is now 57 years of age. On March 8, 1939, he was married to Kinta Desmare at Pensacola, Florida. Miss Desmare was born December 4, 1903, and is now [fol. 8] 39 years of age, and had never theretofore been married. Plaintiff had been married on two previous occasions and lawfully divorced from his former wives. By plaintiff's first wife he had two children, a daughter and son, both of whom are still living. By his second wife he had one child, a son, who is still living. Plaintiff's daughter was married and had two children. Thus, at the time of plaintiff's third marriage, he had three children and two grandchildren, all living. At the time of plaintiff's marriage to Miss Desmare, both parties were and still are in good health. At the time of said marriage, plaintiff was possessed of considerable wealth in money and securities, all of which Miss Desmare lacked (her net worth being negligible), and plaintiff had dependents and obligations which he desired to safeguard and protect against future contingencies.

IV

Shortly before plaintiff's marriage to Miss Desmare, he had been called upon to defend a divorce proceeding in which heavy money demands were made upon him by his second wife. Before making any definite matrimonial arrangements with Kinta Desmare, plaintiff discussed with her his previous marital affairs, advised her of his financial condition and of his desire to provide for his family by the previous marriages, as well as the nature of his business and his desire to enter into a pre-nuptial agreement before his marriage with her. Miss Desmare was agreeable to the

idea and preferred some form of immediate payment in consideration and exchange for any statutory dower, widow's allowance and/or other rights to which she would become entitled by the contemplated marriage. As a result of these conferences, an ante-nuptial agreement was prepared and executed by and between the said parties at Pensacola, Florida, on March 7, 1939 (the day prior to their marriage). A true and correct copy of said agreement is hereto annexed as Exhibit "A", which recites in detail the reason for the making thereof.

[fol. 9]

V

Pursuant to the aforesaid agreement and within the ninety-day period therein specified, to-wit, on May 29, 1939, plaintiff created an irrevocable trust to which he transferred $300,000 in cash. The money was on that date deposited with Commercial Trust Company of New Jersey to the credit of an account entitled "Charles E. Merrill, as Trustee under deed of trust dated May 29th, 1939, made by Charles E. Merrill in the amount of $300,000.00." A copy of the trust indenture is hereto annexed as Exhibit "B". On May 29, 1939, plaintiff also executed his will, which contains clauses designed to carry out the provisions of Exhibit "A". Prior to the execution of Exhibit "B" and of plaintiff's said will, the trust indenture and the relevant provisions of the will were approved by A. A. Moreno, personal attorney of Mrs. Merrill, as conforming in all respects to the requirements of the pre-nuptial agreement (Exhibit "A").

VI

The aforesaid transactions between Charles E. Merrill and Kinta Desmare were in good faith.

VII

Plaintiff's net worth on March 7, 1939, and at the time of his marriage to Miss Desmare was in excess of $5,300,000, consisting of cash, stocks, bonds and similar securities. In addition thereto, plaintiff owned his Palm Beach home valued at $100,000, and other Florida real estate valued at $35,000. On May 29, 1939, the net worth of the plaintiff was approximately the same as above, if the creation of the $300,000 trust fund made on said date be not excepted there-

from, as is evidenced by information to this effect submitted by the plaintiff to the Commissioner of Internal Revenue on August 22, 1940.

VIII

On May 11, 1940, plaintiff filed with the Commissioner [fol. 10] of Internal Revenue, on Treasury form 709, gift tax return for the year 1939. A copy of that return, with its accompanying rider, is hereto annexed as Exhibit "C".

IX

In filing their income tax returns for the calendar year 1939, neither the plaintiff nor his said wife, the former Kinta Desmare, reported income or profit on the transactions set forth in paragraphs IV and V of this stipulation.

X

The Commissioner of Internal Revenue did not agree with plaintiff's claim of "no gift tax liability", and on July 23, 1940, sent plaintiff a thirty-day letter with statement attached, proposing a deficiency assessment of $99,000, but affording him an opportunity for protest. A copy of said letter is hereto annexed as Exhibit "D". Pursuant thereto plaintiff's attorney prepared and filed with the Commissioner on August 22, 1940, his protest against such a deficiency assessment. A copy of that protest is hereto annexed as Exhibit "E".

XI

In support of the above-mentioned protest, plaintiff submitted to the Internal Revenue Agent in Charge at Jacksonville, Florida, various documents including (1) copy of the ante-nuptial agreement, Exhibit "A", (2) copy of the inter-vivos trust indenture, Exhibit "B", and (3) an affidavit showing plaintiff's aforesaid net worth at the date of the ante-nuptial agreement and at the time of his marriage to Miss Desmare, and (4) his own affidavit dated January 10, 1941, Exhibit E-1, hereto.

XII

It is stipulated and agreed between the parties if either S. H. or Lee J. Wolfe, consulting actuaries should be called as witnesses in this case and should be sworn and permitted

to testify over the defendant's objection, either of them [fol. 11] would testify that he had made the computation of October 26, 1940, addressed to Chadbourne, Hunt, Jackel & Brown, 70 Pine Street, New York, New York, upon the assumptions therein set forth, a copy of which is hereto annexed as Exhibit "F".

It is further stipulated that a copy of the computation was submitted to the Bureau of Internal Revenue on or about January 7, 1941, and that the formula and computation is correct, if it is possible to place a money value upon the wife's dower interest, under the facts in this case.

XIII

Plaintiff's contention of no gift tax liability was, on July 21, 1941, overruled by letter addressed to him by the Internal Revenue Agent in Charge at Jacksonville, and on August 27, 1941, a notice was forwarded by registered mail to the plaintiff in which he was advised that a deficiency of $99,000 was determined in his gift tax return for the calendar year 1939. Copies of said letters of July 21, 1941 and August 27, 1941, are hereto annexed as Exhibits "G" and "H".

XIV

On December 22, 1941, the defendant Collector issued and sent plaintiff (on Treasury Department form 880) notice and demand for payment of the asserted gift tax deficiency in the amount of $99,000, and $10,540.53 interest, the entire assessment aggregating $109,540.53. A copy of said notice and demand is hereto annexed as Exhibit "I".

XV

On December 27, 1941, plaintiff paid the defendant Collector the said sum of $109,540.53.

Thereafter, on September 19, 1942, plaintiff filed with the Collector of Internal Revenue for the District of Florida his claim for refund on Form 843. A copy of this claim is hereto annexed as Exhibit "J".

[fol. 12] XVI

On October 27, 1942, the Commissioner of Internal Revenue notified plaintiff that his claim for refund was rejected

in its entirety. A copy of said letter is hereto annexed as Exhibit "K". Plaintiff's complaint was filed on January 7, 1943.

Marks, Marks, Holt, Gray & Yates, Sam R. Marks, Attorneys for plaintiff; Herbert S. Phillips, United States Attorney; Harry G. Taylor, Special Assistant United States Attorney, Attorneys for Defendant.

Exhibit "A" to Stipulation of Facts

Exhibit A. attached to the stipulation of facts, being the agreement between plaintiff and Kinta Desmare, is as follows, except the certificates of acknowledgment are omitted.

This Agreement made at Pensacola, Florida this 7th day of March A. D. 1939 by and between Charles E. Merrill, of the County of Palm Beach and State of Florida, party of the first part, and Kinta Desmare, of the Parish of Orleans and State of Louisiana, party of the second part.

Whereas, a marriage is contemplated and intended to be solemnized between the said parties, both of whom are of full age; and

Whereas, the first party desires to make a fair and reasonable provision for the second party in full settlement and satisfaction and in substitution and lieu of any and all rights which, upon the consummation of said marriage, second party would otherwise have or become entitled to as wife, widow or otherwise, in the property which the first party now has or may hereafter own or in his estate upon his death; and

[fol. 13] Whereas, the second party desires to have such provision made for her, in place of and as a substitute for all of the rights, claims and interests to which she may hereafter become entitled, as wife or widow, in the property and estate of every kind, real, personal or mixed of the said first party; and

Whereas, the making of this contract is considered by the said parties to be desirable for many reasons including (among others) the following, to-wit: That first party has heretofore been twice married and has children surviving him by each of said marriages and it is deemed right and proper that he be free at all times to make such definite pro-

vision for their welfare, by will or otherwise, as he may think best; that in the absence of this agreement with second party, he would be greatly hindered if not actually prevented by existing dower and other laws from making equitable distribution of a fair proportion of his property and estate among his aforesaid children and among such children (if any) as he may have by the second party and among other dependents and persons whom he feels to be justly entitled to receive of his bounty; that while the personal net worth of the first party now amounts to a very substantial sum, the very nature of his business (investment banking and stock market operations) continuously involves him in contingent risks which may at any time entail heavy losses—thus changing conditions and possible financial reverses impel him to consider and guard against any unfortunate consequences which his contemplated marriage and the uncertainties of the future may have upon his will and estate; that this agreement will tend to promote marital tranquility and avoid disputes concerning property; that second party desires to presently receive the trust settlement hereinafter mentioned and to be assured of a means of support for herself, should she become the first party's widow, and of some provision for any issue of her contemplated marriage; that she is accordingly desirous of having her property rights as wife and widow fixed at this time or made as certain as is now reasonably possible and has urged the first party to make for her and [fol. 14] any child or children of hers the provision hereinafter set forth; and

Whereas, the first party, realizing that good faith in the making of this agreement requires disclosure upon his part of his personal resources and property holdings, has informed the second party fully and fairly regarding his financial situation, including the amount of his assets, liabilities and net income and she, being advised concerning said matters and by her counsel with reference to the import of this agreement, fully understands and comprehends her rights and the nature, legal effect and consequences of the contract here made; and

Whereas, both of said parties are of the opinion that the considerations herein agreed to be provided by the first party are the full, fair and adequate equivalent of the

rights agreed to be relinquished and surrendered by the second party:

Now therefore, this Indenture Witnesseth:

That in consideration of the premises and of the solemnization of the aforesaid intended marriage and of the sum of One ($1.00) Dollar paid by the first party to the second party at the time of the execution of this agreement, receipt whereof is hereby acknowledged by her, it is mutually agreed between the said parties, as follows:

I

The said Kinta Desmare, party of the second part, has granted, remised, released, relinquished, conveyed and forever quit-claimed and by these presents does grant, remise, release, relinquish, convey and forever quit-claim unto the said Charles E. Merrill, party of the first part, his heirs, personal representatives and assigns:

(a) All of the right, title and interest which she may acquire as wife or widow of the first party in all of the lands, tenements and hereditaments of which the first party may be seized at the time of the marriage of the parties or at any time thereafter.

[fol. 15] (b) All of the right, title and interest which she may acquire as the wife or widow of the first party in and to any and all personal property, tangible or intangible, which the first party may own at the time of the marriage or at any time thereafter.

This conveyance includes all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowance. Second party hereby waives, discharges and releases every interest, claim or demand of whatsoever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned by the first party; so that neither the second party nor her heirs, executors, administrators or assigns, or any of them, shall have or be entitled to assert any right, claim or demand whatsoever against any of the properties or estate of the first party but shall be forever barred and excluded therefrom.

The second party agrees that she will at any time and from time to time upon the request of the first party or his heirs, executors, administrators or assigns, execute, acknowledge and deliver any and all mortgages, deeds of conveyance, bills of sale or instruments of release of any of the real or personal property of which the first party may be seized or possessed at the time of the marriage of the parties or at any time thereafter, so that such mortgages or instruments of conveyance or release when executed and recorded, may show good record title to the properties thereby encumbered, conveyed or affected: The first party or his heirs, executors, administrators or assigns, shall nevertheless have the right to encumber or convey or otherwise deal with reference to any or all of such real or personal properties without the second party joining in the mortgages or instruments of conveyance and every such mortgage or other instrument, without the signature of the second party, shall fully and effectively encumber or convey [fol. 16] or operate upon the property affected thereby.

II

In consideration of the foregoing releases, conveyances and assurances of the second party, the first party hereby agrees:

(a) That within ninety days from the date of said marriage, he will create an irrevocable trust, of $300,000.00 in cash or securities of equivalent value, the provisions of which shall conform to the wishes heretofore expressed by the said Kinta Desmare, that is to say the trust indenture shall provide for the said Kinta Desmare to receive during and throughout her lifetime the net annual income from said trust funds, such income to be paid her quarterly; upon the death of said Kinta Desmare, if she be survived by her mother Mrs. Louis Desmare, the income from the trust funds to be paid to said mother during and throughout her lifetime; upon the death of the said Kinta Desmare, if she be not survived by her mother or upon the death of the latter, if she shall survive her said daughter, the entire trust estate to become the property of and the principal and net income therefrom to be disbursed and paid as follows, to-wit: (1st) To or for the account of any living child or children of Kinta Desmare by her marriage with Charles E. Merrill, share and share alike, or if there be no

such child or children, then (2nd) to the grandchildren of the said Charles E. Merrill living at that time, share and share alike, per capita and not per stirpes. Under either contingency, (1st) or (2nd) above, every person, child or grandchild, benefitted shall be entitled to receive or have properly paid for his or her account his or her pro-rata part of the trust income during such person's minority and upon the attaining the age of twenty-one years, to receive and have paid and transferred to him or her the pro-rata portion of the trust fund which such person is justly entitled to receive. (3rd) If there be no living person under clause (1st) ~~or~~ (2nd) above, to receive said benefits, the entire trust estate shall be paid, transferred and delivered to first party's children viz. Charles Merrill, Doris Merrill [fol. 17] Magowan and James Ingram Merrill, share and share alike, or if either of them be dead then to the survivor or survivors of them, in equal portions.

(b) That if the second party survives him as his widow, first party will provide by his will an additional trust (subject to the limitation in clause (d) hereafter) of $300,000.00 in cash or securities of equivalent value for her benefit, that is to say: It will be therein stipulated that the net annual income from said trust funds shall be paid quarterly to the said Kinta Desmare so long as she shall live and upon her death, if she be survived by her mother, Mrs. Louis Desmare, then such income shall be paid to the latter during and throughout her lifetime; upon the death of the said Kinta Desmare, if she be not survived by her mother, or upon the death of the latter, if she shall survive her said daughter, the entire trust estate to become the property of and the principal and net annual income therefrom to be disbursed and paid as follows, to-wit: (1st) to or for the account of any living child or children of Kinta Desmare by her marriage with Charles E. Merrill, share and share alike, or if there be no such child or children then (2nd) to the grandchildren of the said Charles E. Merrill, living at that time, share and share alike, per capita and not per stirpes. Under either contingency (1st) or (2nd) above, every person benefitted, child or grandchild, shall be entitled to receive or have properly paid for his or her account his or her pro-rata part of the trust income during such person's minority and upon attaining the age of twenty-one years to receive and have paid or transferred

and delivered to him or her the pro-rata portion of the principal fund which such person is justly entitled to receive; (3rd) if there be no living persons under clauses (1st) or (2nd) above, entitled to receive said benefits, the entire trust estate shall be paid, transferred and delivered to first party's children viz. Charles Merrill, Doris Merrill Magowan and James Ingram Merrill, share and share alike, or if either of them be dead, then to the survivor or survivors of them in equal portions.

[fol. 18] (c) Subject to the limitations in clause (d) hereafter, to will and bequeath an additional $300,000.00 in cash or property or securities of equivalent value for the benefit of any living child or children of Kinta Desmare by her marriage with Charles E. Merrill; such bequest to be in the form of a trust which shall provide for the net annual income from the trust funds to be used and applied to the maintenance, support and education of such child or children, equally and ratably, until he, she or they severally attain the age of twenty-five years, then to be disbursed in equal portions to such child or children, that is to say: Every such child as he or she attains the age of twenty-five years shall become entitled to receive and shall be paid one-half of his or her pro-rata of the principal of said fund and at the age of thirty-five years such child shall become entitled to receive and shall be paid the remainder of his or her share of the principal fund; provided, if there be more than one child entitled to participate in said fund and any such child shall die before attaining the age entitling him or her to receive his or her distributive share of the principal, then such undistributed portion shall inure to the benefit of and shall be paid to the surviving child or children, share and share alike; or if every such child shall have died before the time for distribution, the undistributed trust estate shall become the property of and shall be paid, transferred and delivered to the first party's children Charles Merrill, Doris Merrill Magowan and James Ingram Merrill, share and share alike, of if either of them be dead, then to the survivor or survivors of them in equal portions.

(d) If the first party's property and assets shall at the date of his death be depleted and diminished by losses (other than gifts) to such extent that his net estate, after deductions for all inheritance and other taxes, legal ex-

penses and costs of administration, be then worth less than $2,000,000.00, the bequests provided for under clauses (b) and (c) of this agreement shall each be limited to fifteen percent of the value of the first party's net estate.

[fol. 19] III

Nothing herein contained is intended to deprive the said Kinta Desmare of the right to receive during coverture from the said Charles E. Merrill proper maintenance and support for herself and for any children that may be born to her by him.

It is agreed between the parties that this contract shall be construed in accordance with the laws of the State of Florida. If by reason of any law of said State or of any other jurisdiction or if for any other reason this agreement is declared ineffectual to release, transfer, convey and assign the property rights of the second party, which it purports and is intended to release, transfer, convey and assign, then any consideration hereunder given to her shall, in event of first party's death, be chargeable against and deductable from that portion of first party's estate which said second party may be found entitled to receive whether as dower, widow's allowance, child's part, inheritable interest or otherwise.

In Witness Whereof, the said parties have hereto set their hands and affixed their seals, each in the presence of two subscribing witnesses, the day and year first above mentioned.

Charles E. Merrill (Seal). Kinta Desmare (Seal).

Executed in the presence of: Robert A. Magowan, Doris Merrill Magowan, As to First Party. Laura H. Howard, Edward Magowan, As to Second Party.

EXHIBIT "B" TO STIPULATION OF FACTS

Exhibit B attached to the stipulation of facts, being the [fol. 20] trust indenture executed by the plaintiff and his wife, is in words and figures as follows, except the certificates of acknowledgment are omitted.

This Indenture, made this 29th day of May, 1939, between Charles E. Merrill, individually, residing at Merrill's Land-

ing, North Lake Trail, Palm Beach, Florida (hereinafter sometimes referred to as the "Grantor"); Charles E. Merrill, as Trustee (hereinafter sometimes referred to as the "Trustee") and Kinta Desmare Merrill wife of the Grantor:

Witnesseth:

Whereas, before their marriage, and on March 7, 1939, Charles E. Merrill and Kinta Desmare Merrill entered into a certain ante-nuptial agreement providing, among other things, for the creation of a trust as hereinafter set forth;

Now, pursuant thereto and in consideration thereof, the Grantor does hereby irrevocably pay, transfer and deliver to the Trustee and his successors the sum of Three hundred thousand dollars ($300,000);

To Have and to Hold the same and any and all other property which shall come into the hands of the Trustee or his successors, through addition, exchange, investment or otherwise, as well as all the income therefrom and accumulations thereof, unto the Trustee and his successors, In Trust Nevertheless, for the following uses and purposes:

1. To receive and collect, beginning on the date hereof, the entire income therefrom, as the same shall accrue, and after paying all the proper charges and expenses incurred from time to time in the administration, care and protection of said trust and property, to pay over the remainder of said income as herein provided.

2. To pay the net income to Kinta Desmare Merrill, not less often than quarterly, so long as she shall live, and upon [fol. 21] her death to pay the net income, not less often than quarterly, to Mrs. Louis Desmare, her mother, so long as she shall live.

3. Upon the death of said Mrs. Louis Desmare, or in the event that the latter should predecease said Kinta Desmare Merrill, then upon the death of said Kinta Desmare Merrill, to divide and pay the principal to the child or among the children of Kinta Desmare Merrill by her marriage with Charles E. Merrill, share and share alike; or, if there be no such children, then to and among the grandchildren of Charles E. Merrill then living, share and share alike per capita and not per stirpes; or, if there be no such grandchildren then living, then to Charles E. Merrill, Jr., Doris

Merrill Magowan and James Ingram Merrill, share and share alike, or if either of them be dead, then to the survivor or survivors of them in equal portions.

4. In the event that any of the principal of any trust hereunder is not finally disposed of under the foregoing provisions hereof, by reason of the fact that all of the children and grandchildren of Charles E. Merrill shall be deceased at the time for the payment of such principal, then such principal sum shall be paid to and among those persons who under the now existing laws of the State of Florida would be entitled to receive the personal property of Kinta Desmare Merrill, were she to die a widow and intestate at the time for such payment, and in the proportions fixed by said laws.

5. In the event that any principal sum shall, under any of the provisions hereof; vest in and become payable to a minor child, the payment of said principal sum to such child shall, notwithstanding the directions hereinbefore given, be deferred until such child shall reach the age of twenty-one years, and until such payment the Trustee shall retain the custody and management of the share belonging to such minor child, and shall pay the income therefrom to such child or in his discretion shall apply such income to the education, maintenance and support of such child, and shall [fol. 22] transfer and deliver the possession of said principal sum to such child when it shall have reached the age of twenty-one years; *provided, however*, that nothing contained in this paragraph 5 shall be construed to postpone the time when such principal sum shall vest in and belong to such child as determined under the foregoing provisions hereof.

6. The terms "child", "grandchild" or "issue", wherever used herein, shall be construed to mean a lawful child, grandchild or issue, respectively, by blood and not by adoption.

Article I. Where no regularly appointed times for the payment of income are fixed by the terms of this instrument, the Trustee shall pay such income quarterly or as nearly so as possible.

Article II. No successor trustee shall be held responsible for any cause whatsoever except wilful misconduct, nor

shall any successor trustee hereunder be liable for any mistake of law or fact, or for the act or default of any other person or institution with whom or into whose hands any of the trust moneys or securities or other property shall be placed or deposited or come.

Article III. No bond, undertaking or other security shall be required of any trustee hereunder in any jurisdiction whatsoever, for the discharge of his or its duties hereunder.

Article IV. At all times after Charles E. Merrill shall have ceased to act as Trustee, two of the following, to be selected as hereinafter provided, shall act as co-Trustees hereof, namely, Robert A. Magowan, Louis F. Desmare, Charles Merrill Matzinger, Sam R. Marks, Albert F. Jaeckel, Doris Merrill Magowan, Charles E. Merrill, Jr., and that Vice President from time to time in charge of the Personal Trust Department of The Chase National Bank of the City of New York at its main office, in said city, except that if the above described Vice President of The Chase National Bank of the City of New York shall [fol. 23] be or become the sole trustee because no other of the foregoing named individuals shall qualify as Trustee, the person holding the office of such Vice President and his successor(s) as such Vice President shall act as sole Trustee. The selection of a successor Trustee or Trustees shall be made from the above list by Kinta Desmare Merrill as occasion arises from time to time, provided such selection is made within sixty (60) days of the occurrence of the vacancy; otherwise, the hereinbefore named individuals shall succeed one another in the order in which they are named.

Article V. In the administration of the estate and the trusts hereby created, the Trustees shall have power and authority:

1. With any cash at any time held hereunder, to purchase or subscribe for any securities or other property.

2. To pledge, sell for cash or on credit, convert, redeem, exchange for other securities or other property, or otherwise dispose of any securities or any other property at any time held hereunder.

3. To exercise any conversion privilege and/or subscription right available in connection with any securi-

ties or other property at any time held hereunder; to effect or consent to the partial or total liquidation, reorganization, consolidation, merger or readjustment of the finances of any corporation, company or association, or to the sale, exchange, mortgage, pledge or lease of the property of any corporation, company or association any of the securities of which may at any time be held by the Trustee, and to do any act with reference thereto, including the exercise of options, making of agreements or subscriptions, and the payment of expenses, assessments or subscriptions which the Trustee may deem necessary or advisable in connection therewith and to hold and retain any securities or other property which the Trustee may so acquire.

[fol. 24] 4. To vote, personally or by general or limited proxy, any shares of stock which may be held hereunder at any time, and similarly to exercise, personally or by general or limited power of attorney, any right appurtenant to any securities or other property held hereunder at any time.

5. To borrow money, or assume existing obligations, with or without pledge or mortgage, for the purpose of or in conjunction with acquiring, improving or preserving property, paying taxes, making subscriptions, exercising options, paying assessments, and for the accomplishment of any other purpose of the trust hereby created.

The words "securities or other property" as used in this indenture shall be deemed to refer to and include specifically real and personal property, tangible or intangible, of every nature and description, including stocks, whether common or preferred, bonds, notes or other evidences of indebtedness, whether secured or unsecured, although such securities or other property may not be designated as a legal investment for a trustee under the laws applicable hereto, may be unproductive, or may constitute the greater part of or the entire trust estate.

Article VI. The Trustees shall have power to value for purposes of division, any property held in trust hereunder, such valuations to be final and conclusive, and to distribute

such property at such valuations with like effect in all respects as if the property had been sold at such valuations and the proceeds thereof distributed in money. The Trustee may also in his discretion, hold the trust fund, or such portion thereof as he may deem advisable, as an undivided whole, and without actual separation into the different trusts hereby constituted, and may administer and collect the income thereof and pay the same to the beneficiaries entitled thereto with the same force and effect as through there had been an actual division of the trust fund into the [fol. 25] different shares or portions as hereinabove provided; but this shall not be construed as authorizing the Trustee to hold any funds which he is obligated by this instrument to distribute.

Article VII. The Trustee may, in his discretion, appoint an agent, in whose name either the shares of stock or any other securities or property covered by this trust, or any part thereof, shall stand and be held.

Article VIII. Any securities held hereunder may be left for safekeeping with any safe deposit company, bank or trust company, including any safe deposit company, bank or trust company, or any branch or agency thereof, in any state of the United States or in any foreign country, and the Trustee shall not be liable for the selection of such safe deposit company, bank or trust company, except for want of good faith.

Article IX. The Trustee hereunder may at any time employ the advice and services of counsel, including any firm of attorneys of which any trustee hereunder may be a member, and also of investment counsel, accountants, bookkeepers and agents of any nature.

Article X. Any person shall have the right at any time and from time to time to add any property to the trust fund herein created. Such addition may be effected by an assignment, transfer and delivery of such property to the Trustee together with a notice in writing to said Trustee specifying the property so added to said trust fund. All such additions shall thereupon become a part of the trust estate, and subject in every respect to the terms and conditions of this indenture and to the trust herein created.

Article XI. The provisions hereof relative to the powers, duties, liabilities and immunities of the Trustee shall apply to the administration by said Trustee of any accumulation of income held pursuant to the terms hereof and of any share of a minor child, the payment of which is deferred under the provisions hereof, to the same extent as to the [fol. 26] administration of any other property by said Trustee under this Indenture.

Article XII. The word "Trustee" as herein used, except as otherwise herein expressly defined or limited, shall be construed to apply either to the original Trustee, or to co-Trustees, or to the successor or substitute Trustee or Trustees, or any of them as the case may be.

Article XIII. This Indenture and the trusts and powers hereby created shall be governed by and construed in accordance with the laws of the State of Florida.

Article XIV. All of the provisions of this Indenture whether directing the disposition of income or principal, or otherwise regulating the execution of this trust, or prescribing the powers, duties, liabilities or immunities of the Trustee, shall be construed as severable, so that if any provision hereof shall be invalid, such invalidity shall not affect in any manner the validity of the remaining provisions hereof, and this Indenture shall be construed as if such invalid provision were not included herein.

Article XV. Charles E. Merrill hereby accepts the trust hereby created on the terms herein specified. Charles E. Merrill agrees to act as Trustee hereunder without compensation. Each individual Successor Trustee hereunder shall be entitled while in office to compensation in the following amounts and no more:

> 2% annually of the income collected during that year, and 1% of the value of the principal received by him and 1% of the value of the principal paid over by him to his Successor Trustee or any beneficiaries hereunder.

Article XVI. Kinta Desmare Merrill accepts the terms of this trust as full compliance with subdivision (a) of Article II of the aforesaid ante-nuptial agreement.

[fol. 27] In Witness Whereof, the parties hereto have hereunto set their hands and affixed their seals as of the day and year first above written.

Charles E. Merrill (L. S.). Charles E. Merrill, as Trustee (L. S.). Kinta Desmare Merrill (L. S.).

Exhibit C attached to the stipulation of facts is in words and figures as follows, except that the forms of affidavits and forms on the back thereof are omitted.

(Here follows 1 photolithograph, side folio 28)

EXHIBIT C to STIPULATION of FACTS

Form 709
TREASURY DEPARTMENT
Internal Revenue Service
(Revised November 1955)

(Place in one of Collector)
RECEIVED

UNITED STATES

GIFT TAX RETURN

CALENDAR YEAR 19....

(To be filed in duplicate with the Collector of Internal Revenue for the district and state that the donor was domiciled or resided on the last day of March following the close of the calendar year)

TAXPAYER'S COPY

Detach and retain this copy and the instructions.

DONOR ..... MR. CHARLES E. MERRILL
(Given name) (Middle name or initial) (Surname)

ADDRESS MERRILL'S LANDING, NORTH LAKE TRAIL, PALM BEACH FLORIDA

CITIZENSHIP ..... U.S.A.

RESIDENCE ..... ABOVE

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding $4,000 in value (or regardless of value if in trust or a future interest) as follows? (Answer "Yes" or "No.")

1. By the creation of an irrevocable trust for the benefit of another No
2. By making additions to an irrevocable trust previously created for the benefit of another No
3. By permitting a beneficiary (other than yourself) to receive the income from a trust, whom you possessed the power to alter, amend, or revoke, and which during the year had no interest in, whether such trust was created before or after the enactment, on June 6, 1932, of the Gift Tax Act of 1932 No
4. By relinquishing a power to alter, amend, or revoke a trust created for the benefit of another No
5. By permitting another to withdraw funds from a joint bank account which were deposited by you No
6. By irrevocably designating a life insurance policy, or by naming a beneficiary of a policy without reserving any of the legal incidents of ownership therein No
7. By paying a premium under an insurance policy in which you retain none of the legal incidents of ownership and the proceeds of which are payable to a beneficiary other than yourself or your estate No
8. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety No
9. By any other method, direct or indirect No

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

		SEE RIDER
1. Total included amount of gifts for year (Item c, schedule A)		$
2. Total deductions for charitable, public, and similar gifts for year (schedule B)	$	
3. Specific exemption claimed (see instructions)		
4. Total deductions (Item 2 plus Item 3)		
5. Amount of net gifts for year (Item 1 minus Item 4)		$ NONE

COMPUTATION OF TAX

1. Amount of net gifts for year (Item 5, above)	$ NONE
2. Total amount of net gifts for preceding years (Item c, schedule C)	3,108,631.10
3. Total net gifts (Item 1 plus Item 2)	3,108,631.10
4. Tax computed on Item 3	750,298.26
5. Tax computed on Item 2	750,298.26
6. Tax on net gifts for year (Item 4 minus Item 5)	$ NONE

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed hereon or on schedule A was made by me (the donor) during said calendar year

NOTARIAL SEAL

Sworn to and subscribed before me this .....

day of ..... 19....

(Signature of donor executing return)

(Signature and title of officer administering oath)

AFFIDAVIT

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

NOTARIAL SEAL

Sworn to and subscribed before me this .....

day of ..... 19....

(Signature of person preparing return)

(Signature and title of officer administering oath)

(Address of person preparing return)

[fol. 29] Rider to Charles E. Merrill 1939 Gift Tax Return

On May 29, 1939 the taxpayer created an irrevocable trust for the benefit of his wife and others, to which he transferred at that time the sum of $300,000 in cash.

This trust was created pursuant to an ante-nuptial agreement executed on March 7, 1939 between the taxpayer and his wife, wherein, in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property, the taxpayer agreed to create this trust for the benefit of his wife, her mother, and the remaindermen designated by Mrs. Merrill in said agreement. The parties were married on March 8, 1939.

In view of the net worth of the taxpayer and the value of the real estate and other property owned by him at the time the trust was created and the other circumstances set forth in said ante-nuptial agreement, and in view of the absence of any donative intent on the part of the taxpayer, he has excluded the amount of the transfer to this trust from Schedule A of the Gift Tax Return for 1939 on the ground that the relinquishment by Mrs. Merrill of her inchoate dower and other marital rights in his property constituted a valuable consideration in money or money's worth at least equal to the sum of $300,000, the amount transferred to the trust in question.

EXHIBIT "D" TO STIPULATION OF FACTS

July 23, 1940.

MT-ET-GT-268-39-1st New York
Donor—Charles E. Merrill

[fol. 30] Mr. Charles E. Merrill, Merrill's Landing, North Lake Trail, Palm Beach, Florida.

SIR:

The examination by this office of your gift tax returns for the year 1939 indicates that the adjustment of your tax liability shown in the accompanying statement is warranted.

If You Agree to the adjustment shown in the accompanying statement, the enclosed form of waiver should be executed and forwarded to this office promptly in order to permit the early assessment of the additional tax and to stop

the accumulation of interest. Such interest will cease thirty days after the receipt of the executed form, or upon the payment of the additional tax to the collector, whichever occurs first.

If you desire to make immediate payment of the additional tax without awaiting assessment, you should forward your remittance to the Collector of Internal Revenue at Jacksonville, Florida, enclosing this letter, or a copy thereof. Interest on the additional tax should be included in your remittance, computed at the rate of six percent per annum from the due date of the tax to the date of payment.

If You Do Not Agree to the proposed adjustment, you may file a protest, executed in triplicate under oath, with the Internal Revenue Agent in Charge, Jacksonville, Florida, within thirty days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in the office of the Internal Revenue Agent in Charge will be granted you prior to final determination of any deficiency against you. This letter is not a final notice of deficiency, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed statement.

Should you fail to pay the additional tax to the collector of internal revenue or to file with this office within the thirty-day period mentioned either a waiver on the enclosed form [fol. 31] or to file with the Internal Revenue Agent in Charge a written protest, final determination of your tax liability will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of gift tax deficiencies.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully, (Signed) D. S. Bliss, Deputy Commissioner.

Enclosures: Statement. 11003. Form of waiver. Form of acknowledgement.

Donor—Charles E. Merrill.

Calendar year—1939.

Statement

The proposed deficiency is computed as follows:

	Returned	*Tentatively Determined*
Total gifts, 1939, other than charitable, public or similar gifts	$0.00	$300,000.00
Less exclusions	0.00	0.00
Amount of gifts	0.00	300,000.00
Less specific exemption	0.00	0.00
Net gifts, 1939	0.00	300,000.00
Net gifts for preceding years	3,108,631.10 *	3,118,631.10
[fol. 32] Total net gifts	3,108,631.10	3,418,631.10
Tax on total net gifts	750,298.26	852,598.26
Tax on net gifts for preceding years	750,298.26	753,598.26
Tax on net gifts, 1939	0.00	99,000.00
Tax shown on return		0.00
Deficiency, 1939		99,000.00

* The increase in the net gifts for preceding years is due to the reduction in the amount allowed as specific exemption from $50,000.00 to $40,000.00 in accordance with the provisions of Section 301 (b) and (c) of the Revenue Act of 1935.

The proposed deficiency results from the following adjustments:

Schedule A

Cash transferred to a trust created under date of May 29, 1939	0.00	300,000.00
To balance (amount of increase)	300,000.00	

The transfer made by you to the trust created under date of May 29, 1939, pursuant to the agre-ment made on March 7, 1939, by and between you and Kinta Desmire is tentatively determined to constitute a gift within the meaning of the Gift Tax Act of 1932 as not having been made for a full and adequate consideration in money or money's worth.

EXHIBIT "E" TO STIPULATION OF FACTS

Exhibit E. attached to the stipulation of facts is as follows, except the affidavit and certificate thereto omitted:

In the Treasury Department of the United States Bureau of Internal Revenue

In the Matter of CHARLES E. MERRILL, Merrill's Landing, [fol. 33] North Lake Trail, Palm Beach, Florida

1939 Federal Gift Tax Deficiency

Before the Internal Revenue Agent in Charge, Jacksonville, Florida

Protest

The above-named taxpayer, a citizen and resident of the United States, residing at Merrill's Landing, North Lake Trail, Palm Beach, Florida, is in receipt of a letter dated July 23, 1940 (bearing Bureau symbols MT-ET-GT-268-39-1st New York), from the Deputy Commissioner of Internal Revenue enclosing statement which shows a tentative determination of a deficiency of $99,000 for Federal Gift Taxes with respect to gifts made during the year 1939.

By Trust Indenture dated May 29, 1939, the taxpayer created a trust for the benefit of his wife, Kinta Desmare Merrill, for life with the second life interest on her death to her mother, Mrs. Louis Desmare, for life and with remainder over on the death of the second life tenant abovementioned to the children of the taxpayer and Kinta Desmare Merrill, or, if there be no such children, to the grandchildren of the taxpayer then living per capita, provided that if there be no grandchildren then to certain named children of the taxpayer then living. The taxpayer trans-

ferred to this trust the sum of $300,000 and the sole question involved in this protest is whether the taxpayer is liable for a gift tax with respect to this transfer.

As stated in the rider attached to the Gift Tax Return of the taxpayer, the above-mentioned trust was created pursuant to an ante-nuptial agreement executed on March 7, 1939, between the taxpayer and his above-mentioned wife, Kinta Desmare Merrill, wherein, in consideration of the [fol. 34] solemnization of the marriage, and Mrs. Merrill's promise to release and relinquish all dower and other marital rights in the taxpayer's property, he agreed to create this trust for the benefit of herself, her mother, and the remaindermen designated by Mrs. Kinta Desmare Merrill in said agreement. The taxpayer was married to Kinta Desmare Merrill on March 8, 1939.

Exception

Exception is Taken to the Proposed Determination That the Transfer to the Above-mentioned Trust Constituted a Gift Within the Meaning of the Gift Tax Act of 1932

The sole basis upon which the proposed deficiency has apparently been made is that the transfer was not "made for a full and adequate consideration in money or money's worth".

The Internal Revenue Code provides as follows:

> "Sec. 1002. Transfer for Less Than Adequate and Full Consideration
>
> "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

It has been decided that the release of dower constitutes "adequate and full consideration in money or money's worth" within the meaning of the above Section. *Bennet B. Bristol*, 42 B. T. A.—(1940, C. C. H. Dec. 11,241). It would seem, therefore, that the only remaining question

was whether the value of the dower interest was equivalent to $300,000.

[fol. 35] Under the laws of Florida (Florida Compiled General Laws Supplement 1934, Sec. 16,103 (1935 as amended)), the dower rights of Mrs. Kinta Desmare Merrill were:

> (a) If, at the death of the taxpayer, there were no issue living of the marriage of himself and Kinta Desmare Merrill the latter would be entitled to a "child's" share of the taxpayer's estate. Since the taxpayer had three children, the issue of prior marriages, the dower interest under this contingency would be equivalent to not less than one-quarter interest in the estate of the taxpayer.
>
> (b) If, at the death of the taxpayer, there were issue living of the marriage of himself and Kinta Desmare Merrill she would be entitled to a dower interest equivalent to one-third in fee simple of the real property owned by the taxpayer and one-third absolutely of all personal property owned by him.

The taxpayer was a man of very substantial means; he was over seventeen years the senior of Kinta Desmare; he had recently been involved in bitterly contested divorce proceedings. Admittedly the exact value of the "dower" rights surrendered by Kinta Desmare is difficult to fix. However, both parties were represented by counsel and the ante-nuptial agreement was arrived at as a result of informed negotiation by these representatives. The agreement (of which a copy is on file with the Bureau of Internal Revenue) required the taxpayer, in addition to the establishment of the trust, to make certain provisions in his will (which he has done). The sum total of the consideration required to be paid and performed by the taxpayer was believed to represent a fair and adequate consideration for the rights released, and vice versa.

For the above reasons, therefore, it is submitted that the transfer by the taxpayer on May 29, 1939, of the sum of $300,000 to the trust created by him pursuant to the above-mentioned agreement of March 7, 1939, did not constitute a [fol. 36] taxable gift within the provisions of the Federal Gift Tax Act.

Should any further information be desired by the Internal Revenue Agent in Charge, the taxpayer will be very glad to furnish the same.

The taxpayer requests a hearing with regard to this protest. Dated: August 21, 1940.

Respectfully submitted, Charles E. Merrill.

EXHIBIT "E-1" TO STIPULATION OF FACTS

STATE OF FLORIDA,
County of Palm Beach, ss:

Charles E. Merrill, being first duly sworn, deposes and says:

I was born on October 19, 1885, at Green Cove Springs, Florida.

On March 8, 1939, at Pensacola, Florida, I was married to Kinta Desmare, I being a resident of Florida having my home at Palm Beach. Miss Desmare was born in December, 1903, and had never been married. I had been married on two previous occasions, and had of course been lawfully divorced. By my first wife I had two children (a daughter and a son) who are still living; by my second wife I had one child (a son) who is still living. My daughter is married and has two children, so that at the time of my third marriage I had three children and two grandchildren, all living.

At the time of our marriage and up to the present, Miss Desmare and I have always been in good health; however, [fol. 37] as may be noted from the foregoing, there is quite a disparity in our ages, she being more than 18 years my junior. While I was possessed of considerable wealth in money and securities (which she lacked), I had dependents and obligations which I felt impelled to safeguard and protect against future contingencies.

Shortly before my marriage to Miss Desmare, I had been called upon to defend a divorce proceeding in which heavy money demands were made upon me by my second wife, and that incident afforded an additional reason for my wishing to dispose by pre-nuptial agreement, once and for all time, of all such problems. Miss Desmare was agreeable to the idea, and in fact she preferred some form of immediate

assurance and protection for herself and her mother as against the possibility of inheriting an uncertain sum at my death. She accordingly consulted her attorney, A. A. Moreno, Esq., of New Orleans, Louisiana, and I made frank disclosure to her and to him of my existing financial condition. As the result of these negotiations, an ante-nuptial agreement was prepared and executed on March 7, 1939 (the day prior to our marriage), a copy of which agreement has been furnished to the Commissioner of Internal Revenue and will be referred to herein as Exhibit A. This agreement recites, perhaps more fully than has been herein stated, our reasons and motives for making the settlement.

Pursuant to said agreement and within the 90-day period therein specified, viz. on May 29, 1939, I created an irrevocable trust to which I transferred $300,000 in cash, being the amount stipulated in Exhibit A. A copy of the trust indenture has been forwarded to the Commissioner and will be referred to herein as Exhibit B. On May 29, 1939, I also executed my will, which contains clauses designed to carry out and which I believe will in fact carry out the provisions of Exhibit A. There is no necessity for producing my will at this time, but it is available.

[fol. 38] Prior to the execution of Exhibit B and my will, the trust and the relevant provisions of the will were approved by A. A. Moreno, Esq., my wife's personal attorney, as conforming in all respects to the requirements of Exhibit A.

The proposed additional gift tax assessment for 1939 against me is as I understand it based on whether full and adequate consideration was received by me for the amount of $300,000 transferred by me in trust on May 29, 1939.

No statement of my net worth was ever prepared as of March 7, 1939. However, audits of my affairs were made as of December 31, 1938, and December 31, 1939. Based on these audits, Mr. W. G. Taylor, who is in charge of my books, has prepared an affidavit which is submitted herewith as Exhibit C. To the best of my information and belief, this affidavit is true and shows that as of March 7, 1939, my net worth was in excess of $5,000,000.

I am advised that the applicable dower statute of Florida in force on March 7, 1939, was Sec. 5507(1), Compiled General Laws of Florida, which for convenient reference has been copied and attached hereto as Exhibit D. This statute provided in effect that should my wife, Kinta Desmare

Merrill, survive me, she would be entitled to a child's part, or ¼ of my estate, except in the event that there should be issue from our marriage living at my death, in which event she would be entitled to 1/3 of my estate; however, in either event, whether her share was a child's share or 1/3, such portion should be free of all liability from my debts, including all estate, inheritance and other death taxes, and all costs, charges and expenses of administration. In other words, as matters stood when we made the pre-nuptial agreement, the law of Florida provided that my wife, Kinta Desmare Merrill, would inherit at my death at least 25% of my gross estate, or, using the net worth figure above, not less than $1,250,000 (i.e. ¼ of $5,000,000).

By the terms of Exhibit A, my wife, Kinta Desmare Merrill, agreed to accept in lieu of dower and all similar rights [fol. 39] a transfer of $300,000 in trust within 90 days, for her benefit, together with an additional trust for $300,000, to be provided in my will and contingent upon her surviving me.

Exhibit A also took in to account the possibility of issue resulting from our marriage, and stipulated that should there be such a child or children an additional trust for $300,000 would be created by my will to safeguard their maintenance, support and education. There is a further clause in Exhibit A limiting each of the two $300,000 testamentary trust to 15% of my net estate.

My defense against the assessment of any additional gift taxes for the year 1939 is that the transfer in trust of $300,000 made on May 29, 1939, was not a taxable gift, inasmuch as I received in consideration therefor adequate and full consideration in money or money's worth, to wit the release by Kinta Desmare of all dower and property rights in my estate. The validity of this contention is amply justified by reference to calculations based on the respective life expectancies of myself and my wife, Kinta Desmare Merrill, as advocated in Art. 18 of the United States Gift Tax Regulations. According to computations which have been prepared by Messrs. S. H. and Lee J. Wolfe, consulting actuaries, 116 John Street, New York, New York, based on the combined experience table of mortality as extended, with interest calculated at 4%, the value on March 7, 1939, of my wife's expectancy to receive one dollar from my estate was $.422604. (Attached hereto as Exhibit E is a copy of the report setting forth the results

of the above mentioned computation.) As mentioned above, based on my net worth on March 7, 1939, my wife under the laws of Florida was entitled to receive on my death an interest of not less than $1,250,000. It follows, therefore, from the foregoing computations that the value on March 7, 1939, of her expectancy or reversionary interest was $1,250,000 multiplied by .422604, or $528,255. It is evident that the rights relinquished by my wife were of far greater [fol. 40] value than the amount received by her, and that therefore the transfer of $300,000 in trust for her benefit did not constitute a taxable gift by me.

Charles E. Merrill.

Sworn to and subscribed before me this 10th day of January, 1941 at Palm Beach, Florida. J. M. Clifton, Notary Public State of Florida at large My commission expires Jan. 12, 1942.

EXHIBIT "F" TO STIPULATION OF FACTS

Telephone Barclay 7-1832. Cable Address: Lowdarp S. H. and Lee J. Wolfe, Consulting Actuaries, Auditors and Accountants; Lee J. Wolfe, William M. Corcoran, Joseph Linder; London Representative, Nicholson, Beecroft & Co., 5, Cheapside, E. C. 2.

116 John Street, New York, N. Y.

October 26, 1940.

Chadbourne, Hunt, Jaeckel & Brown, 70 Pine Street, New York, N. Y.

GENTLEMEN:

In accordance with your instructions, we have calculated the value of the reversionary interest of D, aged 35, based upon the following assumptions.

1. D has a reversionary interest in a fund which becomes [fol. 41] payable upon the death of M, aged 53, per $1 of the fund.

2. The calculations have been based upon the Actuaries or Combined Experience Table of Mortality with interest at 4%.

3. In determining the reversionary interest of D, the following formula was used:

$$\frac{1}{2}\left\{ {}^{\bullet}53:35 + \frac{{}^{\bullet}52:35}{{}^{\bullet}52} - \frac{{}^{\bullet}53:34}{{}^{\bullet}34} \right\}$$

In the foregoing formula the symbols used represent the following:

A—The amount payable at death.
a—Life Annuity payable at the end of each year.
p—Probability of living for one year.

As a result of the above calculation, we hereby certify that the reversionary interest of D is .422604 per $1.

Respectfully submitted,

S. H. and Lee J. Wolfe.

EXHIBIT "G" TO STIPULATION OF FACTS

Exhibit G. attached to the stipulation of facts, being letter from the Internal Revenue Agent in Charge to the plaintiff, dated July 21, 1941, is as follows:

Treasury Department
Internal Revenue Service
Jacksonville, Fla.

Office of Internal Revenue Agent in Charge, Jacksonville Division

MT-ET-WVB-MH

[fol. 42] July 21, 1941.

MT-ET-GT-268-39-Florida Donor—Charles E. Merrill.

Mr. Charles E. Merrill, c/o Mr. Sam R. Marks, Attorney,

Graham Building, Jacksonville, Florida.

SIR:

Following conference with repect to your protest against the adjustment in gift tax liability set forth in my letter of July 23, 1940 and after full consideration of the excep-

tions which you have taken, this office finds no grounds for a modification of the proposed adjustment. (See Helvering vs. Bennet B. Bristol, C. C. A.-1st Circuit, decided June 27, 1941.)

Should you desire to have this matter referred to the Technical Staff of the Bureau of Internal Revenue, Southern Division, Jacksonville Office, for hearing by that office prior to the issuance of the final notice of deficiency, arrangements will be made accordingly upon your written request. Otherwise, unless you should either pay the deficiency in tax (together with any penalties which may be due) to the collector of internal revenue, or execute and file with this office the form of waiver enclosed with this letter, final determination of tax liability will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of tax deficiencies.

In case you request a review by the Technical Staff, your request will be referred to that office, which will communicate with you regarding the matter. You are advised, however, that the Technical Staff will not consider substantial issues or important evidence unless previously presented to this office.

An additional period of fifteen days from the date of this letter will be allowed for such action as you may wish to take prior to the issuance of the statutory notice.

[fol. 43] Respectfully, Harley Howard, Internal Revenue Agent in Charge.

Enclosures:

Form of waiver
Form of request for reference of case to the Technical Staff

EXHIBIT "H" TO STIPULATION OF FACTS

Exhibit H. attached to the stipulation of facts, being letter from the office of the Commissioner of Internal Revenue to plaintiff, dated August 27, 1941, is as follows, except statement attached thereto is omitted, it being identical with the statement printed as part of Exhibit D. above.

TREASURY DEPARTMENT

Internal Revenue Service

Jacksonville, Fla.

Office of Internal Revenue Agent in Charge,
Jacksonville Division.

MT:GT:Florida
Donor—Charles E. Merrill

August 27, 1941.

Mr. Charles E. Merrill,
Merrill's Landing,
North Lake Trail,
Palm Beach, Florida.

SIR:

You are advised that the determination of your gift tax liability for the calendar year ended December 31, 1939, [fol. 44] discloses a deficiency of $99,000.00, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Jacksonville, Florida, for the attention of MT:GT:EEB. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner; by Harley Howard, Internal Revenue Agent in Charge.

Enclosures:
Statement
Form of waiver

Exhibit "J" to Stipulation of Facts

Exhibit J. attached to the stipulation of facts, being certified copy of plaintiff's claim for refund, is as follows, except the certificate, the printed instructions at the bottom of page two, and the several stamped indications of its receipt in various offices are omitted.

(Here follow 2 photolithographs, side folios 45, 46)

Form 843
TREASURY DEPARTMENT
Internal Revenue Service
(Revised April 1940)

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP
(Date received)

☑ REFUND OF TAX ILLEGALLY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF .....
COUNTY OF ..... } ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps CHARLES E. MERRILL

Business address 70 Pine Street (Street) New York (City) New York (State)

Residence .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Jacksonville, Florida
2. Period (if for income tax, make separate form for each taxable year) from January 1 19 39 to December 31, 19 39
3. Character of assessment or tax Gift Tax
4. Amount of assessment, $ 99,000. tax ; date of payment on or about December 24, 1941
5. Date stamps were purchased from the Government .....
6. Amount to be refunded 99,000. tax, plus interest $10,540.55 $ 109,540.55
7. Amount to be abated (not applicable to income or estate taxes) ..... $ .....
8. The time within which this claim may be legally filed expires, under Section 528 of the Revenue Act of 1932, on or about Dec. 24, 19 46.

The deponent verily believes that this claim should be allowed for the following reasons:

SEE RIDER ATTACHED

(Affiant below also sworn to if space is not sufficient)

Sworn to and subscribed before me this 17 day of Sept 19 42

Signed Charles E. Merrill

Edward L. Clark
(Signature of officer administering oath)

NOTARY PUBLIC, NASSAU COUNTY
(Title) Nassau Co. No. 235

(Notarial Seal)

SEE INSTRUCTIONS ON REVERSE SIDE
N.Y.Co. Clk's No. 647, Reg. No. 3-C-405
Commission Expires March 30, 1943

3811

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column.)

Class of tax and taxable year or period	Assessment List: Last	Month	Year	Amount No. on: Page	Line	Amount assessed	Paid, Abated, or Credited: Date	Amount	Pd. Ab. Cr.
Gift Tax Return						$		$	
Cal Year 1939									
Filed 3/11/40									
Nontaxable									
Gift Tax Def.	SM	Dec.	1941	290	0	99,000 00	12-27-41	109,540 53	Pd.
1939						10,540 53			
Int fr 3/15/40									
to 12/24/41									
					Total	$ 109,540 53	Total	$ 109,540 53	Pd.

Claim No.

I certify that the records of this office show the following facts as to the purchase of stamps

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state: Serial number	Period ending
					$		

(Signed) John L. Fahs, Florida
Collector of Internal Revenue.

Claim examined by— [illegible]

Claim submitted by— J Melcher 10/23/42

Chief, Division.

COMMITTEE ON CLAIMS

Amount claimed... $ 109,540.53

Amount allowed... $ 0.00

Amount rejected... $ 109,540.53

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

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[fol. 47] Rider to Claim for Refund of C. E. Merrill—Gift Tax 1939

On March 11, 1940, claimant filed with the Collector of Internal Revenue at Jacksonville, Florida, a gift tax return for the year 1939 in which he reported that on May 29, 1939, pursuant to the terms of an ante-nuptial agreement entered into by the claimant and Kinta Desmare as of March 7, 1939, he created an irrevocable trust to which he transferred on May 29, 1939 the sum of $300,000 in cash. (Said ante-nuptial agreement of March 7, 1939 and indenture of trust dated May 29, 1939 have been filed with the bureau of Internal Revenue and these instruments, together with the gift tax return, are incorporated herein by reference.) As more fully stated in said return, claimant did not at the time of filing said return pay a gift tax with respect to the transfer to the trust on May 29, 1939 inasmuch as such transfer did not constitute a taxable gift.

On July 23, 1940 a 30-day notice in the usual form was sent claimant by the Commissioner, proposing to assess against claimant a tax of $99,000 because of the transfer by claimant of said $300,000 to said trust. On August 22, 1940 claimant filed with the agent in charge at Jacksonville formal protest against such proposed assessment of 1939 gift tax, which protest was subsequently to-wit, on January 21, 1941 supported by claimant's affidavit outlining fully the facts and circumstances relating to the creation of said trust and the transfer of funds to it and showing that said $300,000 was not a gift but was a transfer made in fulfillment of a pre-nuptial contract undertaking for which claimant in return received full and equivalent considerations; and claimant's affidavit so filed with the agent in charge was in turn supported by various documents or exhibits identified as A to F inclusive; reference to said protest and affidavit and exhibits is hereby made for further particulars thereof.

Despite such protest and full disclosure made by claimant, the Commissioner of Internal Revenue through the Internal [fol. 48] Revenue Agent in Charge, Florida Division, Jacksonville, Florida, on August 27, 1941 issued to claimant a 90-day deficiency letter asserting that there was a deficiency for gift tax for the year 1939 in the amount of $99,000. Said deficiency was asserted solely as a result of the $300,000 transfer on May 29, 1939, as above mentioned. In accordance with the terms of said deficiency letter, an assessment

was made against the claimant on or about December 22, 1941, for a gift tax of $99,000 together with interest of $10,540.53 (computed from March 15, 1940 to December 24, 1941) aggregating $109,540.53. On or about December 24, 1941 claimant paid to the Collector of Internal Revenue at Jacksonville, Florida, the said amount of $109,540.53.

Claimant maintains that he is entitled to refund of the above amount of $109,540.53, together with interest thereon, on the following grounds:

1. That he was never legally liable for the tax and should not have been called upon to pay it, for the several reasons set forth and discussed at length in his aforesaid protest and affidavit and exhibits thereto. If the Commissioner's files do not contain said documents, claimant will supply copies.

2. The transfer on May 29, 1939 made by the claimant did not constitute a transfer "of property by gift" within the meaning of the Revenue Act of 1932, Title III, Sec. 501, 502 and 503, as amended, or within the intent and meaning of Chapter 4, Sec. 1000, 1001 and 1002 of the Internal Revenue Code.

3. The transfer made by claimant on May 29, 1939 was made pursuant to and in fulfillment of the terms and provisions of said ante-nuptial agreement of March 7, 1939 and was not "for less than an adequate and full consideration in money or money's worth" within the meaning of the applicable state law to which the claimant was subject, or the meaning of Section 503 of the Revenue Act of 1932.

4. Under the terms of the applicable state law, Kinta [fol. 49] Desmare upon her marriage to claimant became entitled as his wife to receive a share of his estate. The value of such share as of March 9, 1939, the date of her marriage to claimant, was considerably in excess of $300,600 and all such additional provision as claimant, by said contract of March 7, 1939, had agreed to make for or assure to her. The payment made by claimant to the trust on May 29, 1939 represented the amount of his estate which, under the terms of the ante-nuptial agreement of March 7, 1939, Kinta Desmare had agreed to accept and claimant had agreed to transfer on account of her interest in his estate accruing by virtue of said marriage. The right of Kinta

Desmare to demand and receive said $300,000 vested in her upon her marriage to claimant and consequently the payment by claimant to the trust was made pursuant to a valid contractual obligation and was not a mere voluntary transfer or a payment made with donative intent.

5. As a further ground deponent claims that he is entitled to a refund because he overstated the value of taxable gifts made in 1939 in his gift tax return filed on or about March 11, 1940.

6. As a further ground claimant is entitled to a refund because he overstated the total amount of net gifts for preceding years included in his gift tax return for the year 1939 aforesaid.

7. As a further ground claimant is entitled to a refund because said claimant understated in his aforesaid gift tax return for the year 1939 deductions and/or exemptions to which he was entitled under the provisions of the Internal Revenue Code, as amended.

8. As a further ground claimant is entitled to a refund because said assessment of $109,540.53 is excessive and contrary to law.

[fol. 50] EXHIBIT "K" TO STIPULATION OF FACTS

Treasury Department

Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to MT-ET-GT-268-39-1st New York. Donor—Charles E. Merrill

October 27, 1942.

Mr. Charles E. Merrill, 70 Pine Street, New York, New York.

SIR:

Reference is made to your claim for the refund of $109,540.53, Federal gift tax paid for the calendar year 1939.

Your claim is primarily based on the contention that the transfer of the property to your wife under date of May 27,

1939, pursuant to an antenuptial agreement by and between you and Kinta Desmare did not constitute a taxable gift. It is also alleged that the gift made in 1939 was overvalued, that the amount of net gifts for preceding years was overstated, that you failed to deduct exemptions to which you were entitled and that the assessment of 1939 tax was excessive and contrary to law.

The transfer made in 1939 to your wife pursuant to the terms of the antenuptial agreement was not made for a full and adequate consideration in money or money's worth as required by the gift tax regulations and therefore the entire amount thereof constituted a taxable gift. Your attention is directed to the case of Commissioner v. Bristol, 121 Fed. [fol. 51] (2d) 129 in which it was held that the relinquishment by a prospective wife of her statutory rights was not an adequate consideration in money or money's worth and that a transfer made to her pursuant to an antenuptial agreement was subject to gift tax in its entirety. Accordingly, no adjustment in your gift tax liability may be made on the basis of this contention.

The other allegations made in your claim are vague and indefinite in character and not supported by any specifications or evidence. Accordingly, they are deemed to be insufficient to warrant any change in your gift tax liability for 1939 as determined.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, notice is hereby given of the rejection of your claim in its entirety.

Respectfully, Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner.

Plaintiff's Exhibit L being copy of gift tax return for 1939, filed by Mrs. Charles E. Merrill, is as follows, except forms of affidavits and, on the back thereof, Schedules B and C are omitted.

(Here follow 2 photolithographs, side folios 52-53)

PLANTIFF'S EXHIBIT L

Form 709
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised November 1951

(Stamp for use of Collector)
RECEIVED

UNITED STATES
GIFT TAX RETURN
CALENDAR YEAR 19____

(To be filed in duplicate with the Collector of Internal Revenue for the district's District not later than the 15th day of March following the close of the calendar year)

TAXPAYER'S COPY
Detach and retain this copy and the instructions.

DONOR MRS. CHARLES E. MERRILL

ADDRESS (Give number and street) MERRILL'S LANDING, NORTH LAKE TRAIL, PALM BEACH (Post office) FLORIDA

CITIZENSHIP U.S.A.

RESIDENCE ABOVE

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding $4,000 in value (or made gifts of value if in trust or a future interest) as follows? (Answer "Yes" or "No.")

1. By the creation of an irrevocable trust for the benefit of another No See rider

2. By making additions to an irrevocable trust previously created for the benefit of another No

3. By permitting a beneficiary (other than yourself) to receive the income from a trust, where you possessed the power to alter, amend, or revoke and which during the year met to exercise it, whether such trust was originally subject or made the commitment, on June 6, 1932, of the Tax Act of 1932 No

4. By relinquishing a power to alter, amend, or revoke a trust created for the benefit of another No

5. By permitting another to withdraw funds from a trust fund previously deposited by you No

6. By irrevocably assigning a life insurance policy or by making a beneficiary of a policy without reserving any of the legal incidents of ownership therein No

7. By paying a premium on an insurance policy in which the insured is the donor, beneficiary of ownership and the proceeds of which are payable to a beneficiary other than yourself or your estate No

8. By exchanging this property for property owned by another or by joining with or husband and yourself as owners by the entirety No

9. By any other method, direct or indirect Yes See rider

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Total included amount of gifts for year (Item c, schedule A)		$ 102,180.00
2. Total deductions for charitable, public, and similar gifts for year (schedule B)	$ None	
3. Specific exemption claimed (see instructions)	40,000.00	
		40,000.00
4. Total deductions (Item 2 plus Item 3)		
5. Amount of net gifts for year (Item 1 minus Item 4)		$ 62,180.00

COMPUTATION OF TAX

1. Amount of net gifts for year (Item 5, above)	$ 62,180.00
2. Total amount of net gifts for preceding years (item c, schedule C)	None
3. Total net gifts (Item 1 plus Item 2)	$ 62,180.00
4. Tax computed on Item 3	3,346.20
5. Tax computed on Item 2	-
6. Tax on net gifts for year (Item 4 minus Item 5)	$ 3,346.20

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

NOTARIAL SEAL

Sworn to and subscribed before me this _____ day of _____ 19____

(Signature of Commissioner)

(Signature and title of officer administering oath)

AFFIDAVIT

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

NOTARIAL SEAL

Sworn to and subscribed before me this _____ day of _____ 19____

(Signature of person preparing return)

(Signature and title of officer administering oath)

(Address of person preparing return)

SCHEDULE A.—Total Gifts During Year

ITEM No.	DESCRIPTION OF GIFT, MOTIVE, AND DONEE'S NAME AND ADDRESS	DATE OF GIFT	VALUE AT DATE OF GIFT
			$
	See rider attached	3/7/39	102,180.00

(a) Total	$ 102,180.00
(b) Less total exclusions not exceeding $4,000 for each donee (except gifts in trust or of future interests)	
(c) Total included amount of gifts for year	$ 102,180.00

SCHEDULE B.—Deductions for Charitable, Public, and Similar Gifts During Year

ITEM No.	NAME AND ADDRESS OF DONEE, AND CHARACTER OF INSTITUTION	VALUE AT DATE OF GIFT (Item not applicable next year also reflected in Item 5 of schedule A)
		$ NONE

Total deductions for charitable, public, and similar gifts for year $ NONE

SCHEDULE C.—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (Subsequent to June 6, 1932)

CALENDAR YEAR	COLLECTION DISTRICT IN WHICH PRIOR RETURN WAS FILED	AMOUNT OF SPECIFIC EXEMPTION	AMOUNT OF NET GIFTS
		$	$ NONE

(a) Totals for preceding years (without adjustment for reduced specific exemption)	$	$ NONE
(b) Amount, if any, by which total specific exemptions, line a, exceeds $40,000 (see instructions for schedule C)		NONE
(c) Total amount of net gifts for preceding years (total, last column, line a, plus amount, if any, line b)		$

(If more space is needed, attach additional sheets of same size)

[fol. 54] Rider to Mrs. Merrill's 1939 Gift Tax Return

On May 29, 1939 the taxpayer's husband, Charles E. Merrill, created an irrevocable trust pursuant to the terms of an ante-nuptial agreement entered into between the parties on March 7, 1939, wherein the taxpayer agreed to release and relinquish her inchoate dower and other marital rights in the property of her husband upon the terms set forth in said agreement. The parties were married on March 8, 1939.

The taxpayer is advised that she became a purchaser of the corpus of this trust for a consideration commensurate with the amount of said corpus, to wit, $300,000, and that with respect to the provisions in this trust for the benefit of her mother and the other remaindermen designated therein (after her own life) she, rather than her husband (the grantor of said trust), was the donor of such benefits within the terms of the Gift Tax Law. Therefore, she has computed the value of the interest of the remaindermen in the corpus of this trust according to table A reported in Gift Tax Regulations 79 under article 19 thereof, based on her attained age of 35 on March 7, 1939, the date when the agreement was made under which this trust was created, and this amount is included in Schedule A of this gift tax return as the amount of the taxable gift made by her during 1939.

PLAINTIFF'S EXHIBIT "M"

STATE OF FLORIDA,
County of Duval:

Sam R. Marks, being first duly sworn, deposes and says:

I am Sam Marks, age fifty-seven, attorney at law, and reside at Jacksonville, Florida. I was admitted to the Florida Bar June 23rd, 1909 and have ever since been actively engaged in the practice of law in Jacksonville.

[fol. 55] For many years past I have represented Charles E. Merrill, whom I have known for more than forty years. In 1938 I represented Mr. Merrill in a divorce proceeding instituted against him by his second wife wherein large money demands were made against him; that case may be briefly described as "a bitterly contested litigation" which wa very taxing upon all concerned and trying upon the

health and nerves of my client. It eventually terminated in a final decree, rendered by the Circuit Court for Duval County, Florida, severing the bonds of matrimony between said parties.

In February of 1939 Mr. Merrill made known to me his contemplated (third) marriage to Miss Kinta Desmare, of New Orleans, Louisiana, and consulted me with reference to the then existing Florida dower statute, which was Section 5507 (1), Compiled General Laws of Florida, (Ch. 16103, Acts 1933, Sec. 35; Ch. 17171, Acts of 1935, Sec. 1; Ch. 18066, Acts of 1937, Sec. 1), and as to the feasibility of making a prenuptial agreement with Miss Desmare to settle property rights, safeguard against an unequal distribution of his estate and avoid for all time any possible repetition of such a contest over money matters as he had experienced in connection with the above mentioned divorce proceeding. I advised Mr. Merrill at the time that under the then existing law of Florida his prospective wife, should she survive him, would be entitled to receive a child's part or one-fourth of his estate except in the event there should be issue from said marriage, living at his death—in that event she would be entitled to one-third of his estate; that in either event, whether her share was a child's part or one-third, such portion would be free of all liability for his debts, all estate, inheritance and other death taxes and all costs, charges and expense of administering his estate; that she would also acquire a life estate in his home at Palm Beach, superior to the claims of his creditors. I further stated to Mr. Merrill that in my opinion parties contemplating matrimony could make and execute a valid prenuptial agreement so as to bar dower and other property rights to accrue [fol. 56] to the wife by virtue of the marriage.

Shortly after receiving this advice from me Mr. Merrill instructed me to prepare, and I did prepare the form of prenuptial agreement which he and Miss Desmare executed at Pensacola, Florida under date of March 7th, 1939, copy of which is made Exhibit "A" to the stipulation entered into between counsel for plaintiff and defendant in the case of Charles E. Merrill vs. John L. Fahs, Collector, (Civil Action No. 549-J) now pending in the District Court of the United States for the Southern District of Florida.

I have long had personal knowledge of the affairs of Mr. Merrill and his family and know that his accumulated for-

tune, existing at the time he married Miss Desmare, had been earned by him from his personal efforts and business activities as broker, banker and financier.

Sam R. Marks.

Sworn to and subscribed before me this 17 day of June, A. D. 1943. Alberta D. Taylor, Notary Public State of Florida at Large. My commission expires July 21, 1945.

IN UNITED STATES DISTRICT COURT

Findings of Fact, Conclusions of Law and Opinion—Filed June 24, 1943

In this case the plaintiff seeks recovery for a deficiency gift tax alleged to have been erroneously or illegally assessed against, imposed upon and collected from him by the defendant, Collector. Sections 501 and 503 of the Revenue Act of 1932 are involved. The issues made by plaintiff's complaint and defendant's answer were submitted to and tried by the court upon a stipulation of facts, without a jury. From this stipulation and the documents submitted, [fol. 57] including affidavit of plaintiff's counsel and Mrs. Merrill's 1939 gift tax return, it appears:

FINDINGS OF FACT

The defendant, John L. Fahs, is and at all times material herein was the Collector of Internal Revenue for the District of Florida and a citizen of said State.

The plaintiff Charles E. Merrill was born October 19th, 1885, at Green Cove Springs, Florida, and is now fifty-seven years of age. During 1939 plaintiff was a citizen of Florida but at the time of institution of this suit was a citizen of the State of New York. On March 8, 1939 he was married to Kinta Desmare at Pensacola, Florida. Miss Desmare was born December 4, 1903, is now thirty-nine years of age and had never theretofore been married. Plaintiff had been married on two previous occasions and lawfully divorced from his former wives. By plaintiff's first wife he had two children, a daughter and a son, both of whom are still living. By his second wife he had one

child, a son, who is still living. Plaintiff's daughter was married and had two children. Thus, at the time of plaintiff's third marriage, he had three children and two grandchildren, all living. At the time of plaintiff's marriage to Miss Desmare, both parties were and still are in good health. At the time of said marriage, plaintiff was possessed of considerable wealth in money and securities, all of which Miss Desmare lacked (her net worth being negligible), and plaintiff had dependents and obligations which he desired to safeguard and protect against future contingencies.

Shortly before plaintiff's marriage to Miss Desmare, he had been called upon to defend a divorce proceeding in which heavy money demands were made upon him by his second wife. Before making any definite matrimonial arrangements with Kinta Desmare, plaintiff consulted his Jacksonville attorney with reference to the Florida dower statute and the feasibility of making a valid prenuptial agreement with Miss Desmare, to adjust property rights [fol. 58] between them, and being informed as to such matters told her of his previous marital affairs, advised her of his financial condition and of his desire to provide for his family by the previous marriages, as well as the nature of his business and his desire to enter into a prenuptial agreement before his marriage with her. Miss Desmare was agreeable to the idea and preferred some form of immediate payment in consideration and exchange for any statutory dower, widow's allowance and/or other rights to which she would become entitled by the contemplated marriage. As a result of these conferences an ante-nuptial agreement was prepared and executed by and between the said parties at Pensacola, Florida, on March 7, 1939 (the day prior to their marriage).

A photostatic copy of said ante-nuptial agreement was annexed to the stipulation of facts and filed in evidence as Exhibit "A". It recites at length the reasons and motives of the contracting parties for entering into the agreement and then stipulates and provides that, in exchange for what the first party therein undertakes, the second party "has granted, remised, released, relinquished, conveyed and forever quit-claimed and by these presents does grant, remise, release, relinquish, convey and forever quit-claim unto the

said Charles E. Merrill, party of the first part, his heirs, personal representatives and assigns:

"(a) All of the right, title and interest, which she may acquire as wife or widow of the first party in all of the lands, tenements and hereditaments of which the first party may be seized at the time of the marriage of the parties or at any time thereafter.

"(b) All of the right, title and interest which she may acquire as the wife or widow of the first party in and to any and all personal property, tangible or intangible, which the first party may own at the time of the marriage or at any time thereafter.

[fol. 59] "This conveyance includes all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowances. Second party hereby waives, discharges and releases every interest, claim or demand of whatsoever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned by the first party; so that neither the second party nor her heirs, executors, administrators or assigns, or any of them, shall have or be entitled to assert any right, claim or demand whatsoever against any of the properties or estate of the first party but shall be forever barred and excluded therefrom.

"The second party agrees that she will at any time and from time to time upon the request of the first party or his heirs, executors, administrators or assigns, execute, acknowledge and deliver any and all mortgages, deeds of conveyance, bills of sale or instruments of release of any of the real or personal property of which the first party may be seized or possessed at the time of the marriage of the parties or at any time thereafter, so that such mortgages or instruments of conveyance or release when executed and recorded, may show good record title to the properties thereby encumbered, conveyed or affected: The first party or his heirs, executors, administrators or assigns, shall nevertheless have the right to encumber or convey or otherwise deal with reference to any or all of such real or personal properties without the second party joining in the mortgages or instruments of conveyance and every such

mortgage or other instrument, without the signature of the second party, shall fully and effectively encumber or convey or operate upon the property affected thereby."

The undertakings of the first party, as set forth in the ante-nuptial agreement, included the following:

"That within ninety days from the date of said marriage, [fol. 60] he will create an irrevocable trust, of $300,000.00 in cash or securities of equivalent value, the provisions of which shall conform to the wishes heretofore expressed by the said Kinta Desmare, that is to say the trust indenture shall provide for the said Kinta Desmare to receive during and throughout her lifetime the net annual income from said trust funds, such income to be paid her quarterly; upon the death of the said Kinta Desmare, if she be survived by her mother Mrs. Louis Desmare, the income from the trust funds to be paid to said mother during and throughout her lifetime; upon the death of the said Kinta Desmare, if she be not survived by her mother or upon the death of the latter, if she shall survive her said daughter, the entire trust estate to become the property of and the principal and net income therefrom to be disbursed and paid as follows," * * * (giving directions not necessary to be herein set forth).

In addition to the foregoing the first party agreed that should the second party survive him as his widow he would provide by his will an additional trust of $300,000.00 in cash or securities of equal value for her benefit, as per directions set forth in the prenuptial contract.

Said agreement contained additional clauses and stipulations not necessary to be here enumerated at length. It provided that nothing therein contained was intended to deprive Miss Desmare of her right to receive during coverture proper maintenance and support for herself and for any children that might be born to her by Mr. Merrill. It was agreed in the contract that it should be construed in accordance with the laws of the State of Florida.

Pursuant to the aforesaid agreement and within the ninety-day period therein specified, to-wit, on May 29, 1939, plaintiff created an irrevocable trust to which he transferred $300,000.00 in cash. A copy of the trust indenture was filed in evidence as Exhibit "B". On May 29, 1939 plaintiff also executed his will, which contains clauses designed to carry out the provisions of Exhibit "A". Prior to the exe-

[fol. 61] cution of Exhibit "B" and of plaintiff's said will, the trust i-denture and the relevant provisions of the will were approved by the personal attorney of Mrs. Merrill, as conforming in all respects to the requirements of the prenuptial agreement.

The aforesaid transactions between Charles E. Merrill and Kinta Desmare were in good faith.

Plaintiff's net worth on March 7, 1939, and at the time of his marriage to Miss Desmare was in excess of $5,300,000.00, consisting of cash, stock, bonds and similar securities. In addition thereto, plaintiff owned his Palm Beach home valued at $100,000.00, and other Florida real estate valued at $35,000.00. On May 29th, 1939 the net worth of the plaintiff was approximately the same as above, if the creation of the $300,000.00 trust fund made on said date be not excepted therefrom.

The dower statute of Florida in force and effect at the date of the pre-nuptial agreement was Section 5507 (1) Compiled General Laws of Florida (Ch. 16103, Acts 1933 Sec. 35; Ch. 17171, Acts of 1935, Sec. 1; Ch. 18066, Acts 1937, Sec. 1.) It specified that the widow of any decedent might elect to take dower "which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration: Provided, however, that if a decedent be survived by his widow, and lineal descendants and that none of such lineal descendants are also the lineal descendants of such widow, then the dower shall be limited to the portion of the estate [fol. 62] of the decedent to which the widow is entitled under the law of dissent and distribution, to-wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration;"

On March 7th, 1939 Miss Desmare was thirty-five years of age and Mr. Merrill was fifty-three years of age.

The reversionary interest of a person age thirty-five in a fund becoming payable upon the death of a person age fifty-three, per $1.00 of the fund is .422604; this factor is

established by the actuarial calculation filed in evidence, based upon the Actuaries or Combined Experience Table of Mortality with interest at 4%. The stipulation of the parties admits this actuarial computation and formula to be correct "if it is possible to place a money value upon the wife's dower interest under the facts in this case."

On May 11th, 1940, plaintiff filed with the Commissioner of Internal Revenue, on Treasury Form 709, gift tax return for the year 1939 wherein he reported having created the aforesaid irrevocable trust and the transfer of $300,000.00 to it, stating therein that—

> "This trust was created pursuant to an ante-nuptial agreement executed March 7, 1939 between the taxpayer and his wife, wherein, in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property, the taxpayer agreed to create this trust for the benefit of his wife, her mother, and the remaindermen designated by Mrs. Merrill in said agreement. • • •
>
> In view of the net worth of the taxpayer and the value of the real estate and other property owned by him at the time the trust was created and the other circumstances set forth in said ante-nuptial agreement, and in view of the absence of any donative intent on the part of the taxpayer, he has excluded the amount of the [fol. 63] transfer to this trust from Schedule A of the Gift Tax Return for 1939 on the ground that the relinquishment by Mrs. Merrill of her inchoate dower and other marital rights in his property constituted a valuable consideration in money or money's worth at least equal to the sum of $300,000, the amount transferred to the trust in question."

Mrs. Merrill also filed timely gift tax return for the year 1939, reporting the trust created for her pursuant to the ante-nuptial agreement and saying:

> "The taxpayer is advised that she became a purchaser of the corpus of this trust for a consideration commensurate with the amount of said corpus, to-wit, $300,000."

In filing their income tax returns for the calendar year 1939, neither the plaintiff nor his said wife, the former

Kinta Desmare, reported income or profit on the transactions above set forth.

The Commissioner of Internal Revenue disagreed with plaintiff's claim of "no gift tax liability" and on July 23, 1940 sent plaintiff a thirty-day letter, with statement attached, proposing a deficiency assessment of $99,000.00 but affording opportunity for protest. Pursuant thereto plaintiff's attorney prepared and filed with the Commissioner on August 22, 1940 his protest against such a deficiency assessment.

Plaintiff's contention of no gift tax liability was on July 21, 1941 over-ruled by letter addressed to him by the Internal Revenue Agent in charge at Jacksonville and on August 27, 1941 a notice was forwarded by registered mail to the plaintiff in which he was advised that a deficiency of $99,000.00 was determined in his gift tax return for the calendar year 1939.

On December 22, 1941 the defendant Collector issued and sent plaintiff (on Treasury Department Form 880) notice [fol. 64] and demand for payment of the asserted gift tax deficiency in the amount of $99,000.00 and $10,540.53 interest, the entire assessment aggregating $109,540.53.

On December 27, 1941 plaintiff paid the defendant Collector the said sum of $109,540.53.

Thereafter, on September 19, 1942, plaintiff filed with the Collector of Internal Revenue for the District of Florida his claim for refund on Form 843. On October 27, 1942, the Commissioner of Internal Revenue notified plaintiff that his claim for refund was rejected in its entirety.

Plaintiff's complaint herein was filed on January 7, 1943.

Conclusions of Law

Mr. Merrill and Miss Desmare made and executed a prenuptial agreement that was valid and enforceable according to the laws of Florida.

Said parties were thereafter lawfully married.

Pursuant to and in compliance with the agreement, he created for her benefit an irrevocable trust and transferred thereto $300,000.00; he also complied in other respects with the provisions of said agreement.

By the agreement, Miss Desmare released all of her statutory rights, as wife or widow, in his real and personal properties, then owned or thereafter to be acquired by him.

These transactions between the parties were in good faith, for business reasons, and not an attempt to evade or avoid taxes.

Under such circumstances, release of wife's statutory rights may constitute full and adequate consideration, in money or money's worth, for a transfer of property to her by the husband, within the true intent and meaning of Section 503 of the Revenue Act of 1932; whether or not it is such full and adequate consideration is a question of fact. [fol. 65] The evidence in this case shows that the property rights relinquished and conveyed by Miss Desmare and the assurances given by her under the prenuptial agreement did constitute consideration, full and adequate, in money or money's worth, for the transfer by Mr. Merrill to the irrevocable trust of the aforesaid sum of $300,000.00; that said transfer was not a gift but was in performance of a valid contractual obligation; that said transfer was not subject to taxation as a gift under Section 503 of the Revenue Act of 1932, or otherwise.

The defendant Collector, acting under color of his office, erroneously and illegally demanded of Charles E. Merrill a gift tax upon the aforesaid $300,000.00 transfer to the irrevocable trust and, on that account, exacted and collected from the plaintiff, on December 27th, 1941 the sum of $109,540.53 which plaintiff is entitled to recover in this action, with interest thereon from said date as provided by law.

Opinion

The validity of the pre-nuptial agreement and the sufficiency of consideration to sustain it, as between the parties, is not challenged by defense counsel. They maintain, however, that the plaintiff's transfer of funds to the trust was taxable because the term "consideration" as used in Section 503 of the Revenue Act of 1932 is not the same thing as common-law consideration and point to the decision in Commissioner vs. Bristol (C. C. A. 1), 121 F. (2d) 129 where it was said that "the purpose of this section in the gift tax statute was to prevent the depletion of the transferor's estate, unless a tax was paid on the transfer." On this question there seems to be some difference of opinion. In discussing the legislative history of the Revenue Acts and the difference between the words "fair," "adequate" and "full" as they have been used in defining the considera-

tion contemplated by comparable Estate taxing acts, Mr. John E. Hughes in his book "The Federal Death Tax," Section 93, page 152, says: "The law does not require that [fol. 66] the consideration be paid to the donor in order that it may swell his estate and the Court should not add such a provision to the law by judicial construction," citing Mitchell vs. United States, 74 F. (2d) 571, 575 (C. C. A. 7th); and Mr. Randolph E. Paul is evidently of like opinion—in Vol. 1 of his work on "Federal Estate and Gift Taxation," Sec. 11.20, page 602, he says: "The courts have held, as a rule, that consideration need not flow directly to the decedent or his estate," citing numerous authorities. See also Vol. 2 of the same work, Sec. 16.14, page 1114. So the mere fact that plaintiff withdrew money from his assets would not seem to be controlling if he acquired in exchange something that may fairly be said to have been of equivalent benefit or advantage.

It is further contended by defendant that release of a wife's statutory rights may not constitute consideration in money or money's worth and that Congress by Section 804 of the Revenue Act of 1932 has so specified. That Section in Title VI—Estate Tax Amendments, reads as follows:

"Sec. 804. Relinquishment of Dower, etc., as Consideration.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

'For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth' ".

Plaintiff contends that the Federal Courts, prior to 1932, had consistently held the relinquishment of a wife's statutory rights to be consideration in money's worth for a transfer to her of property by the husband; that, with this rule known to it, Congress deliberately omitted from the gift tax [fol. 67] provisions of the 1932 Revenue Act any provision comparable to above quoted Section 804, which amends the Estate tax law. Plaintiff directs attention to the following

authorities: Ferguson vs. Dickson (C. C. A. 3, 300 F. 961; McCaugh vs. Carver (C. C. A. 3) 19 F. (2d) 126; Stubblefield vs. United States (Ct. of Claims) 6 F. Supp. 440; Mason vs. United States (D. C.) 17 F. (2d) 317. Those decisions undoubtedly hold as counsel contend and should be followed unless Congress has specified to the contrary.

The case of Empire Trust Co. vs. Commissioner of Internal Revenue (CCA-4) 94 F. (2d) 307 is noticed but is not considered applicable since it presented a different factual situation and involved an attempt by the taxpayer to circumvent the plain mandate of the estate tax law (requiring the value of a dower interest to be included in computing the gross estate). As that court specifically pointed out:

> "The amount paid the widow under the ante-nuptial agreement became payable to her only on the death of her husband. Had the wife died first, her estate would have had no valid enforceable claim against the husband. The shifting of the economic benefits was occasioned by the death of the husband and did not take place on the execution of the ante-nuptial agreement under which the wife acquired no property rights unless the agreement was matured and made effective by her survival of the husband."

What was said in that opinion must necessarily be considered and weighed in the light of the factual situation there presented.

Counsel on both sides admit the similarity of the Bristol case and when that litigation was before the Board of Tax Appeals (42 B.T.A. 263) this same question, as to the proper construction of the Revenue Act of 1932, arose and was disposed of as indicated by the following excerpts from the [fol. 68] opinion:

> "The difference between the parties in this case arises partly from the parallelism between certain language used in the gift tax law and that found in the estate tax law. The provision 'adequate and full consideration in money or money's worth' appears in both statutes. By Section 804 of the Revenue Act of 1932 the estate tax law of 1926 was amended to provide that the release of dower, or similar interests, 'shall not be

considered to any extent a consideration in money or money's worth.' * * * There is no comparable provision in gift tax law.

Counsel for respondent urges that, despite this omission of the quoted provision from the gift tax sections, we should construe the words 'adequate and full consideration in money or money's worth' in the instant case involving gift tax the same as though we were applying the estate tax sections. We are unable to agree. The gift tax under consideration was imposed by the Revenue Act of 1932, the same Act that amended the 1926 Act respecting estate tax as above noted. Both the gift tax provisions and the estate tax amendment were considered in the same Congressional Committee reports. Nevertheless, the amendment was made specifically applicable to the estate tax and was omitted from the gift tax provisions. The only logical conclusion in the light of such facts is that, with both taxes before it, the Congress did not intend the interpretative restriction placed around the estate tax to apply to the gift tax and that the omission thereof from the gift tax provisions was deliberate. We are of the opinion, accordingly, that the relinquishment of dower or other marital rights may, under the gift tax statute be adequate and full consideration in money or money's worth. The adequacy of the consideration in a given case is a question of fact."

The reasoning of that opinion appeals to me as being [fol. 69] sound and logical and I am disposed to follow it rather than the contrary view set forth in Commissioner vs. Bristol, 121 F. (2d) 129, (CCA-1).

This court therefore holds that insofar as the gift taxing statute is concerned, the release by Miss Desmare of all her statutory rights, as wife or widow, in the real and personal properties of plaintiff, then owned or thereafter to be acquired by him, could constitute "adequate and full consideration in money or money's worth" for his assurances given in the pre-nuptial agreement.

The next question involves an appraisal of the value of the particular rights relinquished by Miss Desmare. An approximation of those rights is not confined to a mere estimate of the size or quantity of estate which plaintiff may leave upon his death and in which his widow, if she

survive him, will have an interest. Plaintiff received by the agreement an immediate and complete relinquishment of his prospective wife's interest in all his property, real and personal, which he then owned or might thereafter acquire. That this was something of considerable value to a man in plaintiff's circumstances is not to be doubted. The situation may be summarized somewhat as follows:

He was on the eve of matrimony; the burdens which the statute would cast upon him were real, definite and immediate—they were not speculative and remote. They were more onerous than at common law. Herzog v. Trust Company of Easton, 67 Fla. 54; 64 So. 426. The wife would have during coverture "a contingent lien" upon everything he owned. Smith vs. Hines 10 Fla. 258. Her interest would tend to obstruct the free and unrestricted disposition by him of his property and the conversion of realty into personalty, or vice versa. She would have to join in all conveyances of his lands as well as in any encumbrance of them (Section 5675 Compiled General Laws of Florida) and, in event of marital disagreement, would be in position to assert [fol. 70] exhorbitant money demands. Certainly these disturbing factors which were amicably disposed of by the agreement, plus the protection gained by him for his children's economic welfare, should be sufficient to justify any court saying that Miss Desmare's release of her rights was of substantial money value to him and should be measureable by the court.

The courts may not abdicate their function of deciding valuation questions because mathematical accuracy is difficult. Guggenheim v. Helvering (CCA-2) 117 F. (2d) 469; Commissioner v. Marshall (CCA-2) 125 F. (2d) 943.

Having enumerated the aforesaid benefits flowing to plaintiff, it should be sufficient to further observe that the dower statute gave to the wife an immediate interest in all his real property and, upon his death, the privilege of electing to take as statutory dower one-fourth of his estate, computed without reference to debts, inheritance taxes and expenses of administration, or a possible one-third thereof should she bear him a child or children. It is established that plaintiff's net worth was then in excess of $5,300,000.00, one-fourth of which is $1,325,000.00. Deducting from this sum the $300,000.00 agreed to be provided for the wife in the form of a testamentary trust, there still remains $1,025,-

000.00 which properly may be said to reflect the amount of the contingent interest which was compromised for cash. By using the actuarial factor .422604 and reducing $1,025,000.00 to present worth, the figure of $433,169.10 is obtained and in my opinion may be fairly said to represent the consideration, in money or money's worth, flowing to Mr. Merrill in exchange for the $300,000.00 transferred by him to the irrevocable trust. It is thus apparent that the transaction was decidedly in his favor.

This court accordingly holds that plaintiff's transfer of $300,000.00 to the irrevocable trust was in exchange for full and adequate consideration received by him, in money or money's worth, that such transfer was not taxable as a gift under Sections 501 and 503 of the Revenue Act of 1932 or [fol. 71] otherwise and that the sum exacted from him by defendant, as and for such tax, was erroneous and illegal.

Judgment will accordingly be entered for plaintiff for the amount claimed with interest from date of payment and costs, as provided by law.

Done and Ordered at Jacksonville, Florida, this 24th day of June, 1943.

Dozier A. DeVane District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 549-J

CHARLES E. MERRILL, Plaintiff,

vs.

JOHN L. FAHS, United States Collector of Internal Revenue for the District of Florida, Defendant

FINAL JUDGMENT—June 24, 1943

This cause came on to be heard on June 18, 1943 and was argued by counsel and submitted and the court having now made and entered its findings of fact and conclusions of law, deciding this issue in favor of plaintiff;

It is therefore considered by the court and so Ordered that the plaintiff, Charles E. Merrill, do have and recover of and from the defendant, John L. Fahs, United States

[fol. 72] Collector of Internal Revenue for the District of Florida, the sum of One Hundred Nine Thousand Five Hundred Forty and 53/100 ($109,540.53) Dollars, with interest thereon from December 27, 1941, as provided by law, until paid, together with the costs of this suit to be taxed by the Clerk of this Court.

The court finds and certifies that the acts complained of against the defendant John L. Fahs (collection of gift tax from plaintiff) were done in the performance by him of his official duty as Collector of Internal Revenue, under the direction of his superiors in office, that there was probable cause for the acts done and, therefore, that no execution shall issue on this judgment.

The Clerk of this Court is ordered and directed to enter this judgment forthwith.

Done and Ordered at Jacksonville, Florida this 24th day of June, A. D. 1943.

Dozier A. DeVane, United States District Judge.

In United States District Court

[Title omitted]

Notice of Appeal—Filed Sept. 17, 1943

Comes Now John L. Fahs, United States Collector of Internal Revenue for the District of Florida, defendant in the above-entitled case, and gives notice of an appeal from the findings and judgment entered and filed therein on June 24, 1943, to the United States Circuit Court of Appeals for [fol. 73] the Fifth Circuit.

This the 17th day of September, A. D. 1943.

Herbert S. Phillips, United States Attorney. Harry G. Taylor, Special Assistant to the United States Attorney.

In United States District Court

Order Extending Time to File Record—October 18, 1943

The motion of the defendant for an order extending the time within which the record on appeal in the above entitled case shall be filed in the United States Circuit Court of Ap-

peals for the Fifth Circuit coming on this day to be heard and it appearing that additional time is necessary, it is, upon consideration

Ordered that said motion be and is hereby granted and the defendant allowed until December 1, 1943, within which to file said record in the Appellate Court.

Done and Ordered at Jacksonville, Florida, this 18th day of October, A. D. 1943.

Dozier A. DeVane, United States District Judge.

IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD—Filed October 21, 1943

To the Clerk of said Court:

In the preparation of the record on appeal in the above case you are requested and directed to include the following:

[fol. 74] 1. Recite the filing and copy into the record the complaint.

2. Recite the filing and copy into the record the answer of the defendant, except omit the caption thereof.

3. Copy into the record the proceedings before the Court on June 18, 1943.

4. Copy into the record the stipulation of facts, except omit the caption thereof, and the exhibits attached thereto as follows:

(a) Exhibit "A" being the agreement between plaintiff and Kinta Dismore, except omit the certificates of acknowledgment.

(b) Exhibit "B" being the Trust Indenture executed by plaintiff and his wife, except omit the certificates of acknowledgment.

(c) Exhibit "C" being copy of Gift Tax Return filed by plaintiff for the year 1939, except omit forms of affidavits and forms on back thereof.

(d) Exhibit "D" letter from a Deputy Commissioner of Internal Revenue to plaintiff dated July 23, 1940, with statement attached.

(e) Exhibit "E" being protest filed by plaintiff, except omit affidavit and certificate thereto.

(f) Exhibit "E-1" being the affidavit of plaintiff dated January 10, 1941.

(g) Exhibit "F" being calculation of S. H. and Lee J. Wolfe dated October 26, 1941.

(h) Exhibit "G" being letter from the Internal Revenue Agent in Charge to plaintiff dated July 21, 1941.

(i) Exhibit "H" being letter from the office of the Commissioner of Internal Revenue to plaintiff dated August [fol. 75] 27, 1941, except omit statement attached thereto, it being identical with that attched to exhibit "D".

(j) Omit Exhibit "I" being the Collector's notice to plaintiff of the assessment and demand for payment.

(k) Exhibit "J" being a certified copy of plaintiff's claim for refund, except omit the certificate, the printed instructions at the bottom of page 2, and the several stamped indications of its receipt in various offices.

(l) Exhibit "K" being letter from the Commissioner of Internal Revenue to plaintiff dated October 27, 1942.

5. Copy into the record plaintiff's exhibit "L" being copy of Gift Tax Return for 1939 filed by Mrs. Charles E. Merrill, except omit forms of affidavits and on back thereof Schedules B and C.

6. Copy into the record plaintiff's Exhibit "M" being the affidavit of Sam R. Marks dated June 17, 1943.

7. Recite the filing and copy into the record the Court's Findings, Conclusions and opinion dated and filed June 24, 1943.

8. Recite the entry and filing and copy into the record the Final Judgment dated June 24, 1943.

9. Recite the filing and copy into the record the defendant's Notice of Appeal.

10. Recite the filing and copy into the record the order extending the time for the filing of the record on appeal in the Appellate Court dated October 18, 1943, except omit the caption thereof.

11. Recite the filing and copy into the record these directions, except omit the caption thereof.

Herbert S. Phillips, United States Attorney. Harry [fol. 76] G. Taylor, Special Assistant to the United States Attorney.

Received a copy of the foregoing Directions this 20th day of October, 1943.

Sam R. Marks, Attorney for Plaintiff.

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN L. FAHS, United States Collector of Internal Revenue for the District of Florida, Appellant,

vs.

CHARLES E. MERRILL, Appellee

SPECIAL APPEARANCE AND MOTION TO DISMISS—Filed November 29, 1943

Charles E. Merrill, the above named appellee, by his attorney, appears specially for the purpose of challenging the Court's jurisdiction and moves for dismissal of this case upon the following grounds:

1. An appeal was not perfected within the time or in the manner prescribed by law.

2. This appellate court has never acquired jurisdiction of this cause.

Sam R. Marks, Attorney for Charles E. Merrill.

[fol. 79] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FIFTH CIRCUIT

[Title omitted]

MEMORANDUM FOR APPELLEE IN SUPPORT OF MOTION TO DISMISS APPEAL—Filed March 10, 1944

Appellee has appeared specially and moved to dismiss this case for lack of jurisdiction. The motion challenges the sufficiency of the appeal notice.

The question presented may be stated as follows:

In order to perfect an appeal under Rule 73, must the appellant specify in the notice filed in Court that he appeals or takes an appeal from the judgment complained of; or is it sufficient if such document merely gives notice of an appeal from the judgment?

It may be observed that this cause of action was legal rather than equitable being in the nature of *indebitatus* [fol. 80] *assumpsit* for money had and received—see cases cited in U. S. C. A., Title 26, Sec. 3772, Note 122 on page 470. In such actions, in order to procure review, it was formerly necessary that writ of error be obtained and filed in the lower court. A writ of error amounted to the institution of a new suit in the court of review—*Simpson* v. *First National Bank*, (C. C. A.) 129 Fed. 257, 259.

Even after writs of error were abolished and review by appeal substituted (U. S. C. A., Title 28, Sec. 861, a & b) it was necessary that an appealing party make application for review and have it allowed within the time prescribed by law—*Robie* v. *Hart, Schaffner & Marx*, (C. C. A. 8) 40 F. 2d 871; *Van Holt* v. *Carter*, (C. C. A. 9) 56 F. 2d 61.

The above outlined steps were jurisdictional. *Robie* v. *Hart, Schaffner & Marx, supra; Muckelroy* v. *Baldwin*, (C. C. A. 8) 70 F. 2d 728.

A defect in jurisdiction by reason of failure to take appeal within time prescribed therefor could not be waived by filing brief on the merits, nor an estoppel created thereby—*Ross et al.* v. *White et al.*, (C. C. A. 6) 32 F. 2d 750.

Under the rules of civil procedure forms of actions are abolished. Rule 2 says "there shall be one form of action to be known as 'civil action.'"

The right of appeal to a Circuit Court of Appeals is prescribed by Rule 73(a) which states that "a party may appeal from a judgment by filing with the District Court a notice of appeal." The filing of a proper notice of appeal in due time is mandatory and jurisdictional. *Walleck* v. *Hudspeth*, (C. C. A. 10) 128 F. 2d 343; *United Drug Co.* [fol. 81] v. *Helvering*, (C. C. A. 2) 108 2d 637; *Morrow* v. *Wood* (C. C. A. 5) 126 F. 2d 1021.

This supplants the petition for appeal, the order allowing an appeal and the citation on appeal and supersedes prior acts providing for writs of error to review judgments rendered in common law actions—Notes to the Rules of Civil Procedure, page 69.

> "The right of appeal being purely statutory
> • • • it is an essential to the jurisdiction of the

appellate court that there be * * * in taking and perfecting statutory proceedings in error, a compliance with all applicable statutory requirements, save to the extent that such compliance may be and is waived or non-compliance excused. For a court either to limit the language used or to add to it would be judicial legislation beyond its province." 4 C. J. S., p. 881.

Rule 73(b) states the requisites for a notice of appeal as follows:

"The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken."

We think this rule contemplates (1) an appeal actually taken and (2) provision for notice to the appellee. Without the appeal there is nothing upon which the notice can effectively operate.

Our viewpoint is supported by official form 27, which reads:

[fol. 82] "Notice is hereby given that C. D. and E. F., defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit (from the order (describing it)) (from the final judgment) entered in this action on ——, 19——.

Signed —— ——, Attorney for Appellants, C. D. and E. F. Address: —— ——."

It is also supported by the U. S. Supreme Court rules and forms for appeal in criminal cases, 292 U. S. 661, 662, 663, Rule III; see form in 78 L. Ed., p. 1516, providing as follows:

"I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the —— Circuit from the judgment above-mentioned on the grounds set forth below.

Signed —— ——, Appellant.

Dated: —— ——."

The appeal notice in this case (Tr. 72) is as follows:

"Comes now John L. Fahs, United States Collector of Internal Revenue for the District of Florida, de-

> fendant in the above-entitled case, and gives notice of an appeal from the findings and judgment entered and filed therein on June 24, 1943, to the United States Circuit Court of Appeals for the Fifth Circuit."

As will be observed, it fails to include an appeal or to specify or show any entry of appeal; nor has defendant sub-
[fol. 83] sequently taken any appeal in this case—it seems he merely filed above notice of a contemplated appeal which was never perfected. Appellee contends that said notice fails to measure up to the requirements of Rule 73.

Mere notice of intention to appeal is not the equivalent of an appeal and does not confer jurisdiction on the appellate court.

> *Benitez* v. *Bank of Nova Scotia*, (C. C. A. 1) 109 F. 2d 743, and cases cited (page 746).

As was said in *United States* v. *New National Coal & Mining Co.*, (C. C. A. 7) 72 F. 2d 168, "merely declaring that he will appeal does not of itself amount to taking an appeal."

A trial court is not divested of jurisdiction nor is appellate jurisdiction conferred by the mere giving of notice of an intention to appeal.

> *Billy* v. *LeFlore County Gas & Elec. Co.*, 146 Okla. 227, 293 Pac. 1009.
>
> *Hamby* v. *Northcutt*, 149 S. W. 2d 484.

In every appeal, the acts which invoke the jurisdiction of the appellate court must occur.

> *Fishman* v. *Fisch Hat Co.*, 200 Atl. 549, 16 N. J. Misc. 316.

The viewpoint of the Florida Supreme Court upon such questions is set forth in *Provident Savings & Bank & Trust Co.* v. *Devito et ux*, 98 Fla. 1076, 125 So. 235. We quote the following headnotes to that decision:

> "Under the Constitution, the Supreme Court has 'appellate jurisdiction' of chancery causes, but the
> [fol. 84] method of which appellate jurisdiction is acquired is prescribed by statute, and adversary parties have a right in the due observance of statutory regulations of the manner in which appeals may be made effective.
>
> • • • • • • •

> The filing in the trial court of a proper entry of appeal is essential to give the appellate court jurisdiction of the cause, and the due recording of the entry of appeal is essential to give the appellate court jurisdiction of the appellees, unless the appellees by waiver or voluntary appearance in the appellate court render the recording of the entry of appeal immaterial.
>
> • • • • • • •
>
> If the entry of appeal that is filed in the trial court is not legally sufficient to give the appellate court jurisdiction of the cause, as when the appeal is made returnable in violation of the statute, or where there is any other fatal defect in the entry of appeal, voluntary appearance of the appellees in the appellate court will not give that court jurisdiction of the cause, even if the parties are properly named in the entry of appeal that is filed in the trial court."

Granting that the new rules aim at a simplified procedure and the elimination of technicalities, we submit the question raised here is not a mere technicality—it is fundamental and jurisdictional. There is no right of review except on appeal and it would seem a simple enough matter for a party to enter an appeal. If he fails to do so the court cannot enter it for him because it has never been invested with jurisdiction of the case.

[fol. 85] Circuit Court of Appeals has no jurisdiction to entertain appeals which are not taken in accordance with statute which gives court appellate jurisdiction.

Credit Alliance Corp. v. Atlantic, Pacific & Gulf Refining Co., (C. C. A. 8) 77 F. 2d 595.

Three months statutory period for appeal is mandatory and jurisdictional and cannot be extended by waiver, consent or by order of Court. *Muckelroy* v. *Baldwin*, (C. C. A. Ark., 1934) 70 F. 2d 728.

In its holding in *Crump* v. *Hill*, 104 F. 2d 36, this court conceded "It is true that the *starting* of an appeal within the time fixed is 'jurisdictional'" but held that, under the facts of that situation, the steps taken by appellant, concurred in by appellee, amounted to the starting of the appeal. In the case at bar appellee has neither concurred in nor consented to the steps taken by appellant which must

accordingly be tested solely by their legal effect. When so tested it seems apparent that no valid appeal has been perfected.

Respectfully submitted, Sam R. Marks, Harry T. Gray, Attorneys for Appellee.

[fol. 86] The difference between a notice of intention to appeal and an appeal actually taken was discussed by the Supreme Court of the United States in the Matter of Hollon Parker, 120 U. S. 737, 30 L. Ed. 818. In that case it was necessary for the court to determine whether a valid appeal had been perfected to the Supreme Court of Washington Territory in the manner contemplated by Section 458 of the Territorial Code. The lower court had rendered judgment against each of the two defendants, severally, and one of them desiring to appeal gave suitable notice to his co-defendant who declined to join therein; thereupon the other defendant proceeded alone to perfect his appeal under the Code which, at that early date, provided for a procedure quite similar to that contemplated by the present Federal Rule 73(a).

While the Parker decision turned upon the question whether one of two parties defendant had properly perfected his appeal (a question different from that involved in the case at bar), we would respectfully refer the Court to the opinion rendered in that case since it sets forth the notices which were given and discusses and construes them and is the only Supreme Court decision we have been able to find which tends to throw light upon the jurisdictional question here involved.

[fol. 87] ARGUMENT AND SUBMISSION

Extract from the Minutes of March 14, 1944

No. 10874

JOHN L. FAHS, United States Collector of Internal Revenue for the District of Florida,

versus

CHARLES E. MERRILL

On this day this cause was called, and after argument by Miss Maryhelen Wigle, Special Assistant to the Attorney General, for appellant, and Sam R. Marks, Esq., and Harry T. Gray, Esq., for appellee, was submitted to the Court.

[fol. 88] OPINION OF THE COURT AND DISSENTING OPINION OF WALLER, C. RCUIT JUDGE—Filed May 3, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10874

JOHN L. FAHS, United States Collector of Internal Revenue for the District of Florida, Appellant,

versus

CHARLES E. MERRILL, Appellee

Appeal from the District Court of the United States for the Southern District of Florida

(May 3, 1944.)

Before Sibley, McCord, and Waller, Circuit Judges

SIBLEY, Circuit Judge:

The suit in the District Court was for the recovery of a gift tax unlawfully exacted by the Collector. The court gave judgment for the plaintiff June 24, 1943. On Sept. 17,

[fol. 89] 1943, a notice was filed entitled in the cause and headed "Notice of Appeal", which reads: "Comes now John L. Fahs, United States Collector of Internal Revenue for the District of Florida, defendant in the above entitled case, and gives notice of an appeal from the findings and judgment entered and filed therein on June 24, 1943, to the United States Circuit Court of Appeals of the Fifth Circuit". Appellee moves to dismiss the appeal because not perfected in the manner prescribed by law. The argument is that the notice is not an appeal, but a notice of an intended appeal, and insufficient to give the appellate court jurisdiction, citing *Benitz vs. Bank*, 109 Fed. (2) 743; *United States vs. New National Coal Mining Co.*, 72 Fed. (2) 168; and *Exparte Hollon Parker*, 120 U. S. 737, besides some decisions from State courts. It is true the notice here is not in the precise language of Form 27 under Rule of Civil Procedure 73(b): "Notice is hereby given that C. D. and E. F., defendants above named, *hereby appeal* to the Circuit Court of Appeals, etc." But the Forms are not mandatory. They are, as stated in Rule 84, "intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate". The requirement of Rule 73(b) is: "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken". This notice does precisely that. No one could fairly doubt that it gave notice of an appeal then taken rather than that one was intended to be thereafter taken. No one of the cases cited is a construction of the Rules of Civil Procedure. The reasoning of *Exparte Hollon Parker* supports the sufficiency of this notice. We hold it to be sufficient and deny the motion to dismiss.

The tax in dispute was assessed in respect of the transfer of $309,000 on May 29, 1939, by plaintiff-appellee Charles E. Merrill to himself as trustee for his wife and her mother. [fol. 90] The transfer was disclosed in a gift tax return by Merrill, but under the claim that it was not taxable as a gift, but was for adequate and full consideration in money or money's worth, to-wit the release by the wife of her dower and all property rights in his estate. A tax was nevertheless assessed and collected, and refund being denied, this suit was brought against the Collector.

The deed of trust recites that on March 7, 1939, Merrill and his wife had made an antenuptial agreement providing

for the trust, and "pursuant thereto and in consideration thereof" the transfer of the $300,000 is made. The facts found support that recital. The transfer was a part of the antenuptial agreement. Merrill, fifty-three years old, already having been twice married and having three children and some grandchildren, and property amounting in value to over $5,300,000, was about to marry Miss Kinta Desmare. To forestall possible family disputes and simplify his business and facilitate his provisions for his children and grandchildren and for his bride, an antenuptial agreement was made in good faith and in due form on the day before the wedding. Each party was represented by legal counsel. The agreement recites as its main purpose the making of a reasonable provision "in full settlement and satisfaction and in substitution and lieu of any and all rights which upon consummation of said marriage, second party would otherwise have and become entitled to as wife, widow or otherwise, in the property which the first party now has, or may hereafter own, or in his estate upon his death". Mention is also made of the possibility of heavy losses in his business, which was investment banking and stock market operations. Therefore, "in consideration of the premises, and of the solemnization of the aforesaid marriage", Kinta Desmare remises and releases, conveys and quitclaims to Merrill all right and title she may acquire as wife and widow in his [fol. 91] lands then owned or thereafter acquired, and all right or interest she may thus acquire in all personal property. Merrill agrees within ninety days to make an irrevocable trust of $300,000 to uses desired by Miss Desmare and by will, if his wife survives, an additional trust of $300,000 to like uses; and still further $300,000 for the benefit of any living child or children born of their marriage. These provisions were stipulated not to deprive her or her children of proper support and maintenance in addition. The first described trust is the one now in controversy. Miss Desmare had no property of consequence. Merrill had land in Florida worth $135,000. The remainder of his wealth was mainly in money, stocks, bonds and other securities. Both were domiciled in Florida in 1939, but Merrill had become a resident of New York when this suit was brought.

The taxing statute is Revenue Act of 1932, Sects. 501, 502, 503, 47 Stats. 169. The tax is laid on transfers during the calendar year of property by gift, and applies whether the transfer is in trust or otherwise, whether the gift is direct or

indirect, and whether the property is real or personal, tangible or intangible. "Where property is transferred for less than an adequate and full consideration in money or money's worth", then the excess of value is to be taxed as a gift. By the same Act, Sect. 804, the estate tax law was so amended as to provide that a relinquishment or promised relinquishment of dower, courtesy or a statutory estate in lieu thereof, or of other marital rights in the decedent's property or estate "shall not be considered to any extent a consideration in money or money's worth". These words, if written into the gift tax law, would of course settle this controversy in favor of the tax. Though in the same Act, they were added by amendment to the estate tax law only. They were thought significant, if not controlling, touching a gift tax in *Commissioner vs. Bristol*, 121 Fed. (2) 129, but [fol. 92] we prefer to rest our decision on the words of the gift tax sections alone. Our question is, then, What if any consideration in money or money's worth did the transferor, Merrill, receive in this transaction?

It will be noted that the agreement of March 7, 1939, which is the recited and actual consideration for the transfer, and which alone purports to relinquish anything on the part of Miss Desmare, was made before she was married, when she had no dower or other right whatever in Merrill's property. It is not a case in which one already a wife sells or relinquishes for a consideration the rights which the law has given her, whether she relinquishes them to her husband or to another. We may well concede that in such a case she gives a money value for what she gets. Such is *Lasker vs. Commissioner*, 138 Fed. (2) 989. This case is one in which a woman offers herself in marriage, and herself alone, for she had no property and the Florida law retains for her all she may after marriage earn or acquire. That law would give her, after marriage, if she survives him, the right to elect dower in her husband's lands and in his personal estate owned at his death; but instead of these uncertain and contingent rights, the parties here agree that these rights shall not come into existence, but another more definite provision shall be made for her. For this substituted provision she pays just what she would have paid for the provision made by law—herself in marriage. Merrill receives that and nothing else. It is what moves him to make a provision for her. When the transaction is consummated he has a wife and $300,000 less money. She has the $300,000 (with

more to follow) and has given herself. Marriage is of course a valuable consideration, so recognized by the law. Antenuptial agreements like this are lawful and valid as against everyone, so far as consideration is concerned. But the acquisition of a wife is not a consideration in money or [fol. 93] money's worth, and it would be a degradation of the wife to attempt so to value her. The applicable Regulations 79, Art. 8, correctly declare: "A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded and the entire value of the property transferred constitutes the amount of the gift." Merrill received no consideration in money or money's worth.

But if we are wrong in thinking the marriage was the only consideration Merrill received, and if by some hocus pocus of law we ought to regard an interest in Merrill's own property which Miss Desmare did not in fact own to be the consideration for what he did for her, the burden of showing the money value of that interest rests upon Merrill; for this is not a transaction at arm's length in the ordinary course of business as to which an adequate consideration will be presumed; *Robinette vs. Helvering, Commissioner*, 318 U. S. 184. That burden has not been and cannot well be borne. But for the antenuptial agreement the wife would on March 8 have had as inchoate dower one-third interest in fee simple after Merrill's death in the lands he owned at marriage or might acquire during the marriage in Florida, provided she elected in writing within a limited time to apply for it. Comp. Genl. Stats., Art. 5507(1)(2). Merrill then owned $135,000 worth of land, his age was known, she was much younger and would probably survive him, so that the present value in money of her dower right in that land could be actuarily computed and would constitute money's worth, but it would not exceed $30,000. There is no evidence whatever that he intended to buy any more land, and therefore no basis for a computation as to any other. The Florida statute above cited would also give her a dower of one-third of the personal property, but only that owned at his death, and to not more than a child's part if there are [fol. 94] children other than by her. Merrill's expectancy of life was 18 or 19 years, and no actuary could foretell what personal property he would have at the end of that time, if any. His present personal wealth he might lose in his business or otherwise. As against the dower right he might

give it away to his children, or freely dispose of it to suit himself in his lifetime. *Smith vs. Himes*, 10 Fla. 258. It is hard to see where Merrill received any consideration on this item, since he could use and dispose of his personal property, except by will, without his wife's approval or consent. But her right in personal property, such as it was, was also subject to change by the legislature, and it so happens that the law was altered on April 21, 1939, while this transfer was in the making, so that the dower right was made subject to the husband's debts at death and to estate taxes. Laws of 1939, p. 16, Chap. 18999. Again no actuary could estimate what Merrill's debts might be eighteen years hence. And yet further, the peculiar dower in personal property in Florida would be lost on Merrill's removal to a State which had no such law, for the law of the decedent's domicile governs the descent and distribution of movables. 15 C. J. S., Conflict of Laws, p. 935. Merrill has already changed his domicile to New York. We see no way to arrive at the money value in 1939 of her prospective dower in personalty under the Florida law, except by the wildest guess.

We repeat our conviction that the true view of this transaction is that in consideration of marriage Merrill made, wisely and rightly, a certain and present provision for his wife in substitution for the uncertain and contingent one given her after his death, at her election, by law. The latter would have been taxable. So is that which was substituted for it.

[fol. 95] The judgment is reversed and the cause remanded with direction to enter one in favor of the defendant.

Judgment Reversed.

WALLER, Circuit Judge, dissenting:

The whole case turns upon Section 503 of the Revenue Act of 1932 which provides that where property is transferred for less than an adequate and a full consideration in money or money's worth the amount by which the value of the property exceeded the consideration shall be deemed a gift and subject to the Federal Gift Tax.

Perplexity arises in the present case as to which transfer of property we should concern ourselves with—the transfer

of dower, and kindred rights by the wife, or the transfer of money by the husband. The majority opinion determines the case from the standpoint of a transfer of $300,000.00 by a husband to a *prospective* wife, pursuant to a pre-nuptial agreement, with the result that the majority reaches the conclusion that there did not flow to the prospective husband any, or at least any *adequate*, consideration in money, or money's worth. It is the view of the majority that all the husband got out of the contract was a wife whose value cannot be measured in money.

A different viewpoint arises, however, out of the fact that the only property, as distinguished from cash, transferred was by the wife in the relinquishment and transfer of all right, title, and interest in "all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowance." The wife, furthermore, waived, discharged, and released "every interest, claim or demand of whatso-[fol. 96] ever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned by the first party" (husband), to the end that neither the wife nor her heirs would thereafter be entitled to assert any right, claim, or demand whatsoever against any of the properties or estate of the husband, but should be forever barred or excluded therefrom. The transfer of property was from the wife to the husband, but it is not argued that since the husband failed to pay her full and adequate consideration therefor she should pay a gift tax on the excess of the value of the property rights transferred over the amount of the payment therefor.

The pre-nuptial agreement was based on the conditions: (1) that the marriage would be later entered into; (2) that within ninety days "from the date of said marriage" the husband would create a trust and pay over the $300,000.00 in cash thereto. Each of these steps was a *sine qua non* without which the pre-nuptial agreement would have been merely *nudum pactum*.

The marriage was consummated, and within ninety days the husband created the trust and paid over the $300,000.00. When the payment of the $300,000.00 was made (which is the critical date, or the date which fixes the status of the transaction whether it be a gift or a transfer for a consideration in money or money's worth), it was not made to a

prospective bride, as observed in the majority opinion, but was made to a wife, who was then lawfully possessed of the rights and status of a wife in the property transferred, and who, by the signing of the trust indenture and by the acceptance of the trust, reaffirmed and ratified her relinquishment of dower and other wifely property rights and privileges described above.

[fol. 97] This situation presents the question of whether or not the *wife*, who in actuality parted with inchoate property right in excess of $1,700,000.00 for the present sum of $300,000.00, transferred property for a full consideration in money or money's worth. There certainly can be no doubt that when the wife on May 29, 1939, accepted the trust and the $300,000.00 she was the wife of the husband, legally entitled to dower in real and personal property, and possessed of all the other rights of a married woman in Florida; and there can be no doubt that her present, but inchoate, interest in the property then owned by her husband was five or six times greater than the amount of cash paid for it. There can be no doubt that she parted with vested and contingent interests in property considerably in excess of the cash received, but oddly, and inaptly, the cash has been made the subject of the majority's inquiry rather than the excess of the value of the wife's property over the cash.

A contract does not become a gift merely because one of the traders made a better deal than the other. The trade was entered into in good faith and without fraud. We are not here concerned with whether the husband or the wife got the best of the bargain in this transaction. We are to determine whether or not there was full and adequate consideration in money or money's worth moving between the parties. Consideration may be either of benefit to one or a detriment to the other party to the contract. Those who insist that the wife was merely a donee seem to disregard the consideration that she parted with, and in order to justify themselves in doing this they weigh the transaction before its maturity, or at a time prior to the payment of the $300,000.00. If it were a gift, it was a gift when payment was made, and not before. That was after marriage. In order for the agreement to be binding it had to be consummated by marriage and the trust agreement had to be made [fol. 98] and money paid after marriage. To the majority the controlling circumstance in fixing the status of the parties was not the payment of the money, but was the signing

of a contract to relinquish dower, etc., which, for its effectiveness, was dependent upon the happening of contingencies.

The day on which the $300,000.00 was paid is the critical date. Nevertheless, the main opinion says: "It is not a case in which one already a wife sells or relinquishes for a consideration the rights which the law has given her, whether she relinquishes them to her husband or to another. We may well concede that in such a case she gives a money value for what she gets. Such is *Lasker vs. Commissioner*, 138 Fed. (2) 989. This case is one in which a woman offers herself in marriage, and herself alone, for she had no property and the Florida law retains for her all she may after marriage earn or acquire."

But the majority overlooked the fact that the pre-nuptial agreement could not have binding effect unless: (1) marriage subsequently took place; (2) the payment of the $300,000.00 was made within ninety days after marriage; and (3) the trust agreement was also executed by both parties after marriage. The wife got nothing until after she became a wife and possessed of dower and other rights under the Florida law. Then it was that the $300,000.00 was paid to her—not as a *prospective* wife but as an actual wife invested with the rights which, in consideration of marriage and the forthcoming payment of $300,000.00, she had agreed to relinquish. Does anyone doubt that if there had been no marriage the agreement would have been in effect? Can there be any room for argument that the money was neither paid nor payable to her as a *feme sole* but only as a wife of the taxpayer? The transaction can only be gauged by the status that existed when the payment was made. The [fol. 99] tax is applied to the payment, not to the relinquishment. If it were a gift, it was made on May 29, 1939, after the marriage, and not on March 7, 1939, the date of the initial agreement. If it were a transaction in money or money's worth, the transaction was effectuated and consummated on the date it was paid, May 29, and the status of the parties on the date of the payment is important in arriving at the tax consequences. The majority has considered the status of the parties on the date of the pre-nuptial agreement as the critical date in disregard of the fact that nothing was paid on the date of the contract on March 7, nor until the wife had something to relinquish. She would not have been bound by any agreement, pre-

nuptial or otherwise, for the relinquishment of such rights if the consideration therefor were not paid as provided in the contract, and until the payment the agreement was still executory. There can be no doubt of the wife's right to have rescinded such a contract upon a failure to pay the consideration.

The wife sold her contingent and inchoate rights to one-third of $5,300,000.00 for $300,000.00. The husband purchased those inchoate and contingent rights for $300,000.00. That is consideration in money's worth—in any language, from whatever end it may be viewed.

The majority based its decision upon the conclusion that the *husband* received no consideration in money's worth for his part in the transaction, notwithstanding that he recaptured for himself and his estate an inchoate interest in one-third of $5,300,000.00 which by operation of law marriage had conferred upon her. The majority opinion recognizes that in Florida a pre-nuptial agreement can be specifically enforced. It recognizes that there is no prohibition against the making of such agreements and that they are not illegal as being contrary to public policy or statute, nevertheless, the majority, insisting that the only considera- [fol. 100] tion that the husband received for his $300,000.00 was a wife, refuses to give effect to the agreement. The view that the husband did not receive for himself or his estate property rights of a value equivalent to, or in excess of, the money which he paid out, is not supported by the law or the facts.

The average man strives not only for the support and appropriate maintenance of his family during his lifetime, but one of the greatest desires of a husband and father is to leave his estate in such shape that those dependent upon him for support and maintenance may after his death find that support in the property which he has accumulated and left to them. A consideration that flows to one's estate is as much a consideration as if it were enjoyed in his lifetime. Life insurance is a good example. The fact that one accumulates assets for the support and maintenance of his family when he is gone suggests that there was a consideration moving to him in the accumulation of such assets. The $300,000.00 which Mr. Merrill paid out secured an asset to him and to his estate, worth at that time in excess of $1,700,000.00—no mere bagatelle. Mr. Merrill also received benefits that flowed to him rather than his estate, some of which

were: (a) the right to transact his business without any veto power on the part of his wife; (b) lessening of the possibility of friction between him, his wife, and her step-children; (c) and by this financial arrangement eliminating the most frequent menace to conjugal and family congeniality. Merrill had previously had financial difficulties with a prior wife who had sought to have large properties awarded to her. "A burnt child dreads the fire", and he doubtless deemed it worthwhile to buy and pay for insur-[fol. 100a] ance against his third wife demanding large alimony as had the second. It is not difficult to embrace his theory. The acquisition, by money or money's worth, of family, conjugal, and financial congeniality, does not characterize sums reasonably expended therefor as a "gift". If all the sums spent by husbands in this endeavor were considered gifts and taxable as such, few other forms of taxation would be required to run the government and to pay the war debt. Reasonable investments in property that are conducive to domestic tranquillity and are helpful in business are not necessarily gifts.

It appears beyond question that the husband or his estate was acquiring inchoate rights in one-third of an estate of $5,300,000.00 for the present sum of $300,000.00, and if the husband trimmed the wife in the deal no tax consequences follow for that reason. The wife doubtless preferred a bird in the hand to two in the bush.

The fact that the Legislature might change the law; that the husband might lose his wealth; that he might move to another state where the marital rights of the wife were different, which possibilities are advanced to support the conclusions of the main opinion, are but arguments in support of the practicality of purpose of the parties to put such contingencies at rest once and for all time. The attainment of financial certainty and the elimination of domestic inharmony due to financial conflicts are considerations of so great a price—a consummation so devoutly to be wished—that husbands and wives when trading to that end, should not be subjected to the gift tax merely because they did not [fol. 101] attempt to swap penny for penny.

The decision of the lower Court was correct and should have been affirmed.

[fol. 102] JUDGMENT

Extract from the Minutes of May 3, 1944

No. 10874

JOHN L. FAHS, United States Collector of Internal Revenue for the District of Florida,

versus

CHARLES E. MERRILL.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with direction to enter judgment in favor of the defendant.

"Waller, Circuit Judge, dissents."

[fol. 103] MOTION AND ORDER STAYING MANDATE—Filed May 9th, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10874

JOHN L. FAHS, United States Collector of Internal Revenue for the District of Florida, Appellant,

versus

CHARLES E. MERRILL, Appellee.

MOTION FOR STAY ORDER

To said Honorable Court:

Comes now Charles E. Merrill, the appellee, by his attorneys, and represents that he desires to apply for and obtain a writ of certiorari from the Supreme Court to review the decision of this court rendered herein May 3rd, 1944, and respectfully requests the entry of an order staying the execution and enforcement of this court's said decree

for a reasonable length of time in order that appellee may make due and timely application for such certiorari.

(Signed) Sam R. Marks, Harry T. Gray, Attorneys for Appellee.

[fol. 104] United States Circuit Court of Appeals for the Fifth Circuit

No. 10874

John L. Fahs, United States Collector of Internal Revenue for the District of Florida, Appellant,

versus

Charles E. Merrill, Appellee.

On consideration of the application of the appellee, in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 9th day of May, 1944.

(Signed) Leon McCord, United States Circuit Judge.

[fol. 105] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 106] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48,570. U. S. Circuit Court of Appeals, Fifth Circuit, Term No. 126. Charles E. Merrill, Petitioner, vs. John L. Fahs, United States Collector of Internal Revenue for the District of Florida. Petition for a writ of certiorari and exhibit thereto. Filed June 3, 1944. Term No. 126 O. T. 1944.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1943.

No. [redacted] 126

CHARLES E. MERRILL, PETITIONER,

VS.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SAM R. MARKS,
Jacksonville, Florida,
Counsel for Petitioner.

FRANCIS M. HOLT,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

CHARLES E. MERRILL, PETITIONER,

VS.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

Your petitioner Charles E. Merrill prays that a writ of certiorari issue to review the judgment entered May 3rd, 1944, by the United States Circuit Court of Appeals for the Fifth Circuit in the above cause, which was No. 10874 in that Court, and in that behalf shows:

SUMMARY STATEMENT.*

On March 8, 1939, your petitioner, Charles E. Merrill, was married to Kinta Desmare at Pensacola, Florida. On the preceding day petitioner and Miss Desmare had exe-

*(Page references are to the printed record.)

cuted a contract (R. 12) whereby she agreed to release all statutory dower and marital rights in petitioner's property and estate upon condition that he would within a ninety-day period create certain trusts for her benefit. As disclosed by the record (R. 8, 13, 36) there were good and sufficient reasons impelling said parties to execute that prenuptial contract. After the marriage and within said ninety-day period and pursuant to the agreement petitioner created for his wife an irrevocable trust (R. 20) to which he transferred $300,000. Petitioner duly reported this transaction but claimed it non-taxable as a gift (R. 28, 29); the Treasury Department disagreed and petitioner was assessed a $99,000 deficiency gift tax for the year 1939 (R. 30, 31). Protest (R. 33) being overruled (R. 42) and claim for refund denied (R. 50), petitioner paid the tax and brought this action against the Collector to enforce refund. Petitioner's contention has been and is that the payment of funds to the trust was not a gift but was a transfer for full and adequate consideration flowing to him, in money or money's worth, viz., his wife's release of her statutory dower and marital rights. The facts in the case were stipulated (R. 7-12). It was conceded by the Government that the transactions between petitioner and his wife were conducted in good faith (R. 9); it was further conceded that the actuarial computation submitted by petitioner to the Bureau of Internal Revenue (R. 40-41) to evaluate the marital rights released to him was correct and based upon an appropriate formula, if it is possible to place a money value upon the wife's dower interest under the facts in this case (R. 11). Said computation disclosed the value of the rights released by the wife to have exceeded by a substantial margin the sum paid by petitioner to the trust. The District Court made findings of fact (R. 57) and stated conclusions (R. 64) and rendered opinion (R. 65) which is reported in 51 F.

Supp. 120, holding that the rights so released could constitute "adequate and full consideration in money or money's worth" within the true intent and meaning of the gift taxing statute and, upon an appraisal of the value of the rights relinquished, further found and held that plaintiff received full and adequate consideration for his transfer of funds to the trust. Judgment for refund of the tax was accordingly entered against the Collector (R. 71). On appeal to the Circuit Court of Appeals for the Fifth Circuit, this judgment has been reversed by a divided court and that is the decision sought to be reviewed—the opinion will be found in the record of this case at page 88 and the reversal order at page 102.

STATUTE INVOLVED AND JUDICIAL RIGHT TO REVIEW.

The statute involved is the Revenue Act of 1932, Sections 501 and 503 (26 U. S. C., Secs. 1000, 1002).

"Sec. 501. Imposition of Tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in Section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *"

"Sec. 503. Transfer for Less Than Adequate and Full Consideration.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall,

for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

The aforementioned decision of the United States Circuit Court of Appeals for the Fifth Circuit was rendered against petitioner on May 3rd, 1944, and under Section 240 (a) of the Judicial Code (28 U. S. C., Sec. 347), this Court has jurisdiction to review that decision.

QUESTIONS PRESENTED.

The record presents the question of statutory construction whether an *inter vivos* transfer by husband of funds to an irrevocable trust for his wife, pursuant to prenuptial agreement and in exchange for her release of statutory dower and marital rights in his property and estate, is *necessarily* a gift and subject to imposition of gift tax because the law contemplates that such rights may not constitute, *to any extent*, a consideration in money or money's worth.

If above question be answered in the negative, then we have the subsidiary question:

Whether the marital rights here released were susceptible of appraisal or valuation and were shown to have equaled in value the sum transferred by the husband to the trust.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

This case involves an important question of gift tax law which has not been but should be settled by this court. On the hearing before three judges of the Fifth Circuit Court of Appeals, two of them have rendered the

decision which finds no direct precedent support except in an opinion rendered by the First Circuit Court of Appeals June 27, 1941, and reported as *Commissioner* v. *Bristol*, 121 F. 2d 129. Of the opposite viewpoint and in conflict therewith are aligned the Court of Appeals for the Third Circuit (*Ferguson* v. *Dixon*, 300 Fed. 961; *McCaughn* v. *Carver*, 19 F. 2d 126); the Court of Appeals for the Seventh Circuit (*Lasker* v. *Commissioner*, 138 F. 2d 989); The Court of Claims (*Stubblefield* v. *United States*, 6 F. Supp. 440); the Tax Court in several cases (*Bristol* v. *Commissioner*, 42 B. T. A. 263; *Jones* v. *Commissioner*, 1 T. C. 1207; *Wemyss* v. *Commissioner*, 2 T. C. 111); in addition to the District Court and dissenting C. C. A. opinions rendered in the instant case.

Thus the rights of petitioner have become enmeshed in the flow of conflicting judicial opinions, as to what is the true and correct interpretation of the gift taxing statute as applied to marital settlements, and unless this Court will assume jurisdiction and determine this controversy, petitioner is without remedy and others having similar transactions must either pay or will be permitted to escape taxation according to the locality and viewpoint of the Judge in the place where such parties may chance to reside at the time of the particular event or transaction.

Charles E. Merrill,
Petitioner,

By Sam R. Marks,
of Jacksonville, Florida,
Counsel for Petitioner.

Francis M. Holt,
Jacksonville, Florida,
Of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

CHARLES E. MERRILL, PETITIONER,

VS.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

PRELIMINARY STATEMENT.

The case calls for a construction of Sections 501 and 503 of the Revenue Act of 1932.

The brief of the Assistant Attorney General, filed in the Circuit Court of Appeals, stated the question as follows:

"Question Presented.

"In 1939 the appellee * * * transferred certain funds to an irrevocable trust for the benefit of his wife in accordance with the terms of an ante-nuptial agreement between them.

The question is whether the amount of such transfer is taxable as a gift under the provisions of Section 501 of the Revenue Act of 1932; the answer depends upon whether the transfer was made upon 'adequate and full consideration in money or money's worth' within the meaning of Section 503 of that Act."

In support of the Government's position it was argued (1) that the release by the transferee-wife of her Florida dower rights was not susceptible of monetary evaluation; (2) that the gift tax law does not contemplate that release of dower or analogous rights shall constitute consideration *to any extent* and (3) that the decision of the District Court nullified two major purposes of the gift tax enactment (a) to prevent or compensate for the avoidance of estate taxes and (b) to prevent the break-up of large estates within families for the purpose of avoiding the higher income tax brackets by distribution of income. It was said in the brief of counsel for the Government:

"We do not believe that a construction of the gift tax law productive of these results or either of them is correct in view of the well understood purpose of Congress to integrate the three kinds of tax."

The foregoing will serve to inform the court of the Government's position below, out of which developed the decision sought to be reviewed and which petitioner thinks should be reviewed for the reasons hereinafter set forth.

STATEMENT OF THE CASE.

The accompanying petition for certiorari contains summary statement of the facts and history of the case and specifies the question which petitioner seeks to have determined by this Court. The Government's statement of the same question is quoted in the foregoing preliminary statement.

Petitioner contends that the Fifth Circuit Court of Appeals erroneously construed Section 503 of the Revenue Act of 1932 in holding that, by transferring funds to an irrevocable trust for his wife, petitioner made her a taxable gift. Petitioner believes that such transfer was for "adequate and full consideration in money or money's worth."

OPINIONS BELOW.

The District Court opinion in favor of petitioner was rendered June 24, 1943, and will be found at page 65 of the record; it is reported in 51 F. Supp. 120.

The opinion of the Fifth Circuit Court of Appeals was rendered May 3, 1944 (R. 88), it was written by Judge Sibley, concurred in by Judge McCord. Judge Waller filed a dissenting opinion. This decision has not yet been reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C., Sec. 347).

ARGUMENT.

For the Federal Courts to evaluate marital rights presents no new tax question; the only thing new is the recent tendency of some courts to depart from precedents.

As far back as 1924, the Court of Appeals for the Third Circuit decided in a case quite similar to this one, where the parties had made a prenuptial agreement and created a trust, that the transaction was of a business character, a *bona fide* sale or exchange, and that the dower rights released by the wife were consideration in money or money's worth, within the true intent and meaning of the Federal statute, for the bonds delivered by the husband to the trust. *Ferguson* v. *Dickson,* (C. C. A. 3) 300 Fed. 961.

The next decision was in 1927, the case of *McCaughn, Collector,* v. *Carver,* also by the Third Circuit and reported in 19 F. 2d 126. It was there held that where the husband had made an irrevocable transfer of a fund in trust in consideration of the wife's relinquishment of her dower, a tax paid under protest was recoverable because the circumstances disclosed a *bona fide* sale for a fair consideration in money or money's worth.

The next decision to be mentioned is *Stubblefield* v. *United States,* decided by the Court of Claims in 1934 and reported in 6 F. Supp. 440. It was there held that when the wife of a grantor exacted a portion of the purchase price for surrendering her inchoate dower rights, the money received by her in the transaction was based on consideration and was not a gift. A similar holding had been made in 1926 by the District Court for the Southern District of Florida in the case of *Mason* v. *United States,* reported in 17 F. 2d 317.

While the several decisions above mentioned involved laws in effect prior to 1932 when the present gift tax statute was enacted, they are none the less valuable as precedents; for they dealt with *inter vivos* transactions alleged to have been without consideration, mere gifts, and effort was made to bring them within the scope of the statute taxing transfers other than those made *bona fide* and for a money's worth consideration.

When the gift statute was enacted in 1932, Congress inserted substantially the same phraseology viz. "where property is transferred for less than an adequate and full consideration in money or money's worth" and it necessarily knew the courts had theretofore accorded to marital rights the status of a money's worth consideration.

It is true Congress had in 1926 amended the estate tax law to specify that any such consideration should be "full and adequate" rather than merely "fair" but if marital rights were a money's worth consideration before that amendment, as had been held, they were none the less so after it--the amendment merely served to impose upon the courts the duty of measuring and evaluating the consideration in each particular case. *Bristol* v. *Commissioner*, 42 B. T. A. 263.

The courts have found no difficulty in valuing rights considerably more intangible and elusive than the wife's right of dower. *Commissioner* v. *Marshall*, (C. C. A. 2) 125 F. 2d 943; see also *Smith* v. *Shaughnessy*, 89 L. Ed. 504, and Paul on Federal Estate & Gift Taxation, Volume II, Chapter 18, Section 18.03 *et seq.* The courts may not abdicate their function of deciding valuation questions because mathematical accuracy is difficult or even impossible. *Guggenheim* v. *Helvering*, (C. C. A. 2) 117 2d 469.

As bearing upon the valuation of marital rights, capital gains taxes have been imposed upon the husband

for securities delivered pursuant to settlement agreement made with the wife. *Commissioner* v. *Mesta* (C. C. A. 3) 123 F. 2d 986; *Commissioner* v. *Halliwell*, (C. C. A. 2) 131 F. 2d 642.

When Congress enacted the Revenue Bill of 1932 providing for gift taxes, it inserted in the same law some estate tax amendments. Section 804 of Title VI of the Revenue Act of 1932 (Estate Tax Amendments) specified that "for the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'" *Similar language was omitted from the gift tax section* (Title III, Section 503) and the only reasonable inference is that such omission was deliberate. This was the view adopted by the Board of Tax Appeals when in 1940 it decided the *Bristol case* (42 B. T. A. 263).

On the facts, the Bristol case was quite similar to this Merrill case and in denying the taxable character of the transaction, the Board said in part:

> "The gift tax under consideration was imposed by the Revenue Act of 1932, the same act that amended the 1926 Act respecting estate tax as above noted. Both the gift tax provisions and the estate tax amendment were considered in the same Congressional Committee reports. Nevertheless, the amendment was made specifically applicable to the estate tax and was omitted from the gift tax provisions. The only logical conclusion in the light of such facts is that, with both taxes before it, the Congress did not intend the interpretative restriction placed around the estate tax to apply to the gift tax and that the omission thereof from the gift tax provisions

was deliberate. We are of the opinion, accordingly, that the relinquishment of dower or other marital rights may, under the gift tax statute, be adequate and full consideration in money or money's worth. The adequacy of the consideration in a given case is a question of fact."

In determining the adequacy of the consideration and in estimating the money value of the wife's marital rights, the Board made use of a simple mathematical formula such as the Treasury Department has approved of for evaluating future estates or interests in expectancy (Gift Tax Regulations 79, Article 19) and found no difficulty in arriving at a result satisfactory to it. In the instant case the taxpayer supplied an actuarial formula and computation which the Government conceded to be correct (R. 11) "if it is possible to place a money value upon the wife's dower interest, under the facts in this case."

On appeal to the Court of Appeals for the First Circuit the decision of the Board in the Bristol case was reversed (*Commissioner* v. *Bristol*, 121 F. 2d 129) and the following new theories were advanced:

"Consideration" as used in Section 503 of the Revenue Act of 1932 is not the same thing as common law consideration.

Release of dower and analogous rights cannot be regarded as consideration for purposes of the gift tax.

To hold otherwise would frustrate the purpose of the gift tax in its chief role as protector of the estate and income taxes

The Board of Tax Appeals, now the Tax Court, has been most reluctant to adopt the viewpoint of the First Circuit Court of Appeals as expressed in the Bristol opinion and has subsequently said regarding it:

"We have not, however, departed from the view expressed in our opinion in that case. Moreover, the comparatively recent decision by the Second Circuit in *Commissioner* v. *Beck's Estate*, 129 F. 2d 243, is especially significant. In that case it was urged that the estate and gift tax provisions of the statute, being complementary, should be integrated for purposes of construction. Similarly rejecting this theory the court held that these provisions, though complementary, were separate and distinct in themselves and that the silence of Congress in its failure to require the integration of their provisions was 'strident.'"

Above excerpt is from the opinion in *Jones* v. *Commissioner*, 1 T. C. 1207, and again in the case of *Wemyss, Petitioner*, v. *Commissioner*, 2 T. C. 111, after referring to the Bristol case, the court said:

"We have subsequently expressed our belief that the basic principle upon which decision was reached is sound (*Herbert Jones*, 1 T. C. 1207, 1209) and the District Court for the Southern District of Florida recently chose to follow it 'rather than the contrary view set forth' in the opinion of the Circuit Court. *Merrill* v. *Fahs*, ___ F. Supp. ___ (June 24, 1943). But an attempt to apply it here could not aid petitioner; for no property or property rights of his prospective wife, vested, contingent, or inchoate, were transferred by her to him. All that he received was her promise to marry him."

It will be observed from the last preceding quotation that the Tax Court took notice of the District Court's opinion in this Merrill case and apparently approved of it. As this court has recently said in *Dobson* v. *Commissioner*, 88 L. Ed. 179, no administrative rulings are entitled to higher credit than those of the Tax Court.

Meanwhile the case of *Lasker* v. *Commissioner* found its way to the Court of Appeals for the Seventh Circuit

and was decided December 4, 1943, 138 F. 2d 989. There the parties had made a pre-nuptial agreement and later negotiated a marital settlement. On this a gift tax was imposed and, in support of the tax, counsel for the Government advanced the same reasons which have been urged here, namely: that the marital rights and claims released by the wife were not the equivalent of a money's worth consideration and were too indefinite and contingent to be measured in terms of dollars. The court, however, took the view that the over-all result of the dealings between the parties should be looked to in ascertaining whether the consideration was adequate; viewed in this light, the court thought there could be no doubt buf that the husband received full value for the payment made by him and held the transaction to be tax free. It was further observed that the language of Treasury Regulations 79, Article 8, was sufficient to warrant decision for the husband, the transaction amounting to a sale or exchange *bona fide*, at arm's length free from any donative intent. The court declined to adopt or follow the reasoning of the Bristol case, pointing out that the Tax Court had taken a similar position and further saying:

> "Not only has the Tax Court refused to follow the reasoning of the Bristol case, but so has the District Court in *Merrill* v. *Fahs, Collector*, (D. C.) 51 F. Supp 120. *We agree with the reasons given by the court in the latter case for its refusal to follow the Bristol case.*"

It therefore seems fair to conclude that petitioner suffered an adverse ruling because his case necessarily had to be heard before the Fifth rather than the Seventh Circuit Court of Appeals; for, as above shown, the latter court had to all intents and purposes affirmed the District Court ruling before the former court heard the case. It

is also to be noted that only three judges sat on the Appellate Court and that one of them strongly dissented. In other words, petitioner's case has been considered by one District Judge and three Appellate Judges, four in all, two of whom think he suffered an unlawful tax while the other two vote to sustain the validity of it. While the opinion rendered by Judge Sibley and concurred in by Judge McCord takes notice of both the Bristol and Lasker decisions, the theory of the Bristol case is adhered to only in part and the Lasker decision is attempted to be distinguished but upon a clearly untenable ground as is forcefully shown by Judge Waller's dissent.

The several decisions on this subject of marital rights as related to gift taxes are certainly in a state of confusion and discord and since the sum paid by petitioner for a tax was quite substantial, in fact large, this case would seem to be one where we are justified in asking even this busy court to review the record on certiorari and give appropriate relief.

Respectfully submitted,

SAM R. MARKS,
Attorney for Petitioner.

FRANCIS M. HOLT,
Of Counsel.

FILE COPY

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No. 126.

Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES E. MERRILL, PETITIONER.

VS.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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No. 126.

Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES E. MERRILL, PETITIONER,

VS.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the district court (R. 52-57) is reported at 51 F. Supp. 120. The opinion of the circuit court of appeals (R. 67-97) is reported at 142 F. 2d 651.

JURISDICTION.

The judgment of the circuit court of appeals was entered May 3, 1944 (R. 78). Petition for a writ of certiorari was filed June 3, 1944, and granted October 9, 1944. The jurisdiction of this court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

In 1939 the petitioner transferred funds to an irrevocable trust for the benefit of his wife in accordance with the terms of an antenuptial agreement between them.

The question is whether the amount of this transfer is taxable as a gift under the provisions of Section 501 of the Revenue Act of 1932; the answer depends upon whether the transfer was made upon "adequate and full consideration in money or money's worth" within the meaning of Section 503 of that Act.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations are set forth in the appendix, *infra*, page 29.

STATEMENT.

The facts which were found by the district court (R. 45-51) from the parties' stipulation (R. 5-10) and from certain documentary exhibits (R. 10-45) may be stated as follows:

The petitioner was born in 1885 in Florida, of which state he was a citizen during the pertinent taxable year. He was a citizen of New York, however, at the time of the proceedings herein (R. 45).

On March 8, 1939, petitioner was married to Miss Kinta Desmare at Pensacola, Florida. At the time of the marriage petitioner's net worth was in excess of $5,300,000 (R. 7); Miss Desmare's net financial worth at that time was negligible (R. 46).

Miss Desmare had never previously been married but petitioner theretofore had been twice married and divorced. By the first wife he had two children, both of whom were then living and one of whom was married and had two children. Petitioner also had another child living, the issue of his second marriage. Shortly before his marriage to Miss Desmare petitioner had been called upon to defend a divorce proceeding in which heavy money demands were made upon him by his second wife; he desired to safeguard and protect his dependents against future contingencies and the obligations which he had (R. 46).

Before making any definite matrimonial arrangements with Miss Desmare, petitioner consulted his attorney with reference to the Florida dower statute and the feasibility of making a valid prenuptial agreement to adjust property rights between himself and his prospective wife. Being informed as to such matters, petitioner told Miss Desmare of his previous marital affairs and of his desire to provide for his family by previous marriages. He also advised her of his financial condition and the nature of his business and informed her of his wish to enter into a prenuptial agreement (R. 46).

Miss Desmare was agreeable to the idea and preferred some form of immediate payment in consideration and exchange for any statutory dower, widow's allowance, or other rights to which she would become entitled by the contemplated marriage (R. 46).

As a result of these conferences an antenuptial agreement was prepared and executed by the parties at Pensa-

cola, Florida, on March 7, 1939, the day prior to their marriage (R. 46). After reciting (R. 10-12) the reasons and motives of the contracting parties, the antenuptial agreement stated (R. 12-16)—

> That in consideration of the premises and of the solemnization of the aforesaid intended marriage and of the sum of One ($1.00) Dollar paid by the first party [taxpayer] to the second party [Miss Desmare]
> * * *
>
> I
>
> * * * [the second party] has granted, remised, released, relinquished, conveyed and forever quit-claimed and by these presents does grant, remise, release, relinquish, convey and forever quit-claim upon the said Charles E. Merrill, party of the first part, his heirs, personal representatives and assigns:
>
> (a) All of the right, title and interest which she may acquire as wife or widow of the first party in all of the lands, tenements and hereditaments of which the first party may be seized at the time of the marriage of the parties or at any time thereafter.
>
> (b) All of the right, title and interest which she may acquire as the wife or widow of the first party in and to any and all personal property, tangible or intangible, which the first party may own at the time of the marriage or at any time thereafter.
>
> This conveyance includes all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowance. Second party hereby waives, discharges and releases every interest, claim or demand of whatsoever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned by the first party; so that neither the second party nor her heirs,

executors, administrators or assigns, or any of them, shall have or be entitled to assert any right, claim or demand whatsoever against any of the properties or estate of the first party but shall be forever barred and excluded therefrom.

The second party agrees that she will at any time and from time to time upon the request of the first party or his heirs, executors, administrators or assigns, execute, acknowledge and deliver any and all mortgages, deeds of conveyance, bills of sale or instruments of release of any of the real or personal property of which the first party may be seized or possessed at the time of the marriage of the parties or at any time thereafter, so that such mortgages or instruments of conveyance or release when executed and recorded, may show good record title to the properties thereby encumbered, conveyed or affected: The first party or his heirs, executors, administrators or assigns, shall nevertheless have the right to encumber or convey or otherwise deal with reference to any or all of such real or personal properties without the second party joining in the mortgages or instruments of conveyance and every such mortgage or other instrument, without the signature of the second party, shall fully and effectively encumber or convey or operate upon the property affected thereby.

Petitioner's undertakings, as set forth in the antenuptial agreement (R. 10-16), included the following (R. 13, 48):

(a) That within ninety days from the date of said marriage, he will create an irrevocable trust, of $300,000.00 in cash or securities of equivalent value, the provisions of which shall conform to the wishes heretofore expressed by the said Kinta Desmare, that is to say the trust indenture shall provide for the said Kinta Desmare to receive during and throughout her lifetime the net annual income from said trust funds, such income to be paid her quarterly; upon the death of the said Kinta Desmare, if she be survived by her

> mother Mrs. Louis Desmare, the income from the trust funds to be paid to said mother during and throughout her lifetime; upon the death of the said Kinta Desmare, if she be not survived by her mother or upon the death of the latter, if she shall survive her said daughter, the entire trust estate to become the property of and the principal and net income therefrom to be disbursed and paid as follows * * *.

In addition to the foregoing, petitioner agreed to provide by will an additional trust of $300,000 for Miss Desmare's benefit; a testamentary trust in that amount was also to be created by him for the benefit of their issue if any (R. 14-15).

The contract provided for its construction in accordance with the laws of the State of Florida (R. 16).

Pursuant to this agreement petitioner created an irrevocable trust to which he transferred $300,000 in cash on May 29, 1939.[1] On that date also petitioner executed his will which contained clauses designed to carry out the additional provisions of the ante-nuptial contract (R. 48-49). Prior to their execution, the trust indenture and will were approved by the personal attorney of the third Mrs. Merrill, as conforming in all respects to the requirements of the agreement (R. 49).

The several transactions between petitioner and Kinta Desmare were entered into in good faith (R. 7, 49).

On May 29, 1939, when the $300,000 was transferred to the Desmare trust, petitioner's net worth (apart from the creation of the trust fund on that date) was approximately the same as it had been on March 7, 1939, the date of execution of the pre-nuptial contract, and on March 8, 1939, the date of petitioner's marriage to Miss Desmare (R. 49). His assets consisted principally of cash, stocks,

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[1]The terms of the trust are set forth at pp. 17-23 of the record.

bonds, and similar securities of a value in excess of $5,300,000. In addition he owned his Palm Beach home valued at $100,000 and other Florida real property valued at $35,000 (R. 49).

The dower statute of Florida in effect at the date of the prenuptial agreement was Section 5507 (1), Compiled General Laws of Florida. It specified (R. 49) that the widow of any decedent might elect to take dower—

> which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration: Provided, however, that if a decedent be survived by his widow, and lineal descendants and that none of such lineal descendants are also the lineal descendents of such widow, then the dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration.

On March 7, 1939, the date of execution of the prenuptial contract, Miss Desmare was 35 years of age and petitioner was 53 (R. 49). An actuarial calculation based upon the Actuaries or Combined Experience Table of Mortality, with interest at 4 percent, was introduced into evidence before the district court under a stipulation of the parties admitting its correctness "if it is possible to place a money value upon the wife's dower interest under the

facts in this case"; the calculation showed that the reversionary interest of a person aged 35 in a fund becoming payable upon the death of a person aged 53 per $1 of the fund is .422604 (R. 34, 49).

On May 11, 1940, petitioner filed with the commissioner of internal revenue his gift tax return for the year 1939 in which he reported the creation of the irrevocable trust and the transfer to it of $300,000, and stated that (R. 25):

> This trust was created pursuant to an ante-nuptial agreement executed March 7, 1939, between the taxpayer and his wife, wherein, in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property, the taxpayer agreed to create this trust for the benefit of his wife, her mother, and the remaindermen designated by Mrs. Merrill in said agreement * * *
>
> In view of the net worth of the taxpayer and the value of the real estate and other property owned by him at the time the trust was created and the other circumstances set forth in said ante-nuptial agreement, and in view of the absence of any donative intent on the part of the taxpayer, he has excluded the amount of the transfer to this trust from Schedule A of the Gift Tax Return for 1939 on the ground that the relinquishment by Mrs. Merrill of her inchoate dower and other marital rights in his property constituted a valuable consideration in money or money's worth at least equal to the sum of $300,000, the amount transferred to the trust in question.

Mrs. Merrill also filed a timely gift tax return for the year 1939, reporting the trust created for her pursuant to the antenuptial agreement and saying (R. 43)—

> The taxpayer is advised that she became a purchaser of the corpus of this trust for a consideration

commensurate with the amount of said corpus, to wit, $300,000.

In filing their income tax returns for the calendar year 1939, neither taxpayer nor his wife, the former Kinta Desmare, reported income or profit on these transactions (R. 50).

The commissioner assessed the instant gift tax deficiency on the ground that petitioner's transfer of $300,000 to the trust in 1939 was subject to the gift tax for that year. Petitioner paid the amount so assessed, filed due claim for refund, and instituted this suit upon the commissioner's rejection of the claim (R. 50-51). The district court held (R. 52 *et seq.*) that the release of a wife's statutory property rights may constitute full and adequate consideration in money or money's worth for a transfer to her by the husband, within the meaning of Section 503 of the Revenue Act of 1932; that whether or not it does constitute such consideration is a question of fact; and that in the case at bar the evidence established that Miss Desmare's release of her statutory rights under the prenuptial agreement did constitute adequate and full consideration in money or money's worth for the transfer by petitioner in 1939 of the $300,000 here involved.

The Circuit Court of Appeals, reversing the District Court, held that the amount of the transfer should have been included in petitioner's gift tax return on the ground that the consideration for the transfer was not susceptible of monetary evaluation and therefore that its adequacy could not be and was not here established (R. 67-72). A dissenting opinion below (R. 72-97) was of the view that the consideration was susceptible of evaluation and that its adequacy had been established.

ARGUMENT.

Petitioner contends that this case was correctly decided by the District Court and improperly reversed by the Circuit Court of Appeals for the Fifth Circuit.

The facts having been previously stated, it would seem unnecessary to do more than comment briefly upon the transaction giving rise to this controversy.

Petitioner and Miss Desmare, executed a prenuptial agreement which was admittedly valid under Florida law.[2] In consideration of his immediate transfer of the funds for which a gift tax has been exacted,[3] she released all of her statutory rights as wife and/or widow in his property and estate. These rights were then defined by Chapter 18066, Laws of Florida, Acts of 1937; Section 5507(1) Compiled General Laws of Florida, as amended. This statute is quoted in appendix hereto. At the time of the marriage Mr. Merrill was 53 years of age and Mrs. Merrill 35; he then had three living children and two grandchildren. The dower statute gave her a 25% inchoate interest in all of his real and personal property, free from all liability for debts, estate and inheritance taxes and charges and expenses of administration.

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[2]The Florida Supreme Court has repeatedly recognized the validity of prenuptial agreements of the kind here involved: *Weeks* v. *Weeks*, 143 Fla. 686, 197 So. 395; *Northern Trust Co.* v. *King*, 149 Fla. 611, 6 So. 2d 539; *North* v. *Ringling*, 149 Fla. 739, 7 So. 2d 476.

[3]By the prenuptial contract, petitioner further agreed that, if his wife survive him, he will provide by his will an additional $300,000 for her benefit. As will be observed from the district court opinion, this promise was taken into account in computing the value of her release. Undoubtedly such a bequest will not be deductible before estate taxes.

In Florida, the right of dower is an interest contingent during the life of the husband but rendered absolute by his death; the right is not derived through her husband but is cast upon the widow by law; it is more liberal than dower at common law, is antagonistical to his estate and preferred over the rights of creditors.[4]

At the time of the prenuptial agreement Mr. Merrill was worth in excess of $5,300,000 net, one-fourth of which would have been at least $1,325,000. In weighing the economic effect of the contemplated third marriage upon his plans for the future, Mr. Merrill saw how the drastic provisions of the Florida dower statute might not only penalize him in certain contingencies but also seriously interfere with the working out of any comprehensive plan for the welfare of his children. Accordingly he desired to dispose once and for all of the wife's contingent claims. The prenuptial agreement (R. 10) recites and the stipulation of facts (R. 6) amplifies the motives impelling its execution.

The case presents a single question of law and although that question might be stated in various ways, we are agreeable to and have adopted respondent's statement of the question as it appears in his (certiorari) memorandum at page 2.[5] Later, on page 16 of that memorandum, respondent divides the question into two parts saying "The real questions involved in the present case are whether the clear meaning of Section 804 of the Revenue

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[4]At an early date, the Supreme Court of Florida, in *Smith* v. *Hines*, 10 Fla. 258, considered, analyzed and clearly stated the nature of dower in Florida. Excerpts from that opinion are given in appendix to this brief. The principles announced by that decision have been reaffirmed repeatedly. See *Henderson* v. *Usher*, 125 Fla. 709, 170 So. 846; *Finlayson* v. *Love*, 44 Fla. at 556; *Catlett* v. *Chestnut, Exr.*, 100 Fla. 1146, 131 So. 120; *Herzog* v. *Trust Co. of Easton*, 67 Fla. 54, 64 So. 426.

[5]The question is herein stated on page 2.

Act of 1932 * * *, in the light of its history * * *, does not require that the same meaning be attached to section 503 * * * here involved and, if it does not, whether the nature of the marital rights relinquished does not prevent a value in money or money's worth from being assigned to them under the later section."

We will address our argument to the question as thus divided and first to the proposition that:

Congress did not intend the interpretative restriction placed around the estate tax by Section 804 of the Revenue Act of 1932 to apply to the gift tax provisions (Section 503) of that act.

This is purely a question of statutory construction but, as respondent has indicated, it requires some consideration of the history of the legislation. To aid in construing the law we also have the committee reports.[6] Then again we have the well settled rule that statutes levying taxes are not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government.[7]

The Revenue Act of 1932 contains nine separate subdivisions or titles. By Title III of that act a new tax was created and imposed on gifts. Title II of the act imposes an additional estate tax and Title VI provides for certain estate tax amendments.

Prior to the amendment of the Estate Tax Law by Section 804 of the 1932 Act, (which adds certain new matter to Section 303(d) of the 1926 Estate Tax law), the estate tax statute was silent as to what might constitute consideration. In several estate tax cases the federal

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[6]See Committee Reports in appendix hereto.

[7]*Gould* v. *Gould*, 245 U. S. 151, 62 L. Ed. 211; *United States* v. *Merriam*, 263 U. S. 179, 68 L. Ed. 240.

courts had held release of dower rights to be a money's worth consideration.[8] The amendment in section 804, (Title VI—Estate Tax amendments), provides for the first time, that "for the purpose of this title (the Estate Tax Title) a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration in money or money's worth." *Those provisions are not however written into the gift tax law.*

There is no congressional intention completely to integrate gift and estate taxes; *Commissioner* v. *Beck's Estate*, (C. C. A. 2) 129 F. 2d 243, and cases cited. The rule that the two taxes are *in pari materia* and must be considered together[9] serves only to here emphasize the Congressional intent to distinguish between marital rights as a consideration of value in *bona fide inter vivos* transactions as compared with transactions intended to become effective only upon death.

It seems clear that Congress has not as yet achieved, or even intended to achieve, integration of the gift, estate and income tax laws. Proof of this are the many instances of double taxation; Cf. *Higgins* v. *Commissioner*, 129 F. 2d 237, 239-240 (C. C. A. 1, 1942), and the proposed plans for the integration of these laws, *e. g.*, Griswold, A Plan for the Co-ordination of the Income, Estate, and Gift Tax Provisions with Respect to Trusts and Other Transfers (1942), 56 Harv. L. Rev. 337.

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[8] *Ferguson* v. *Dickson*, (C. C. A. 3) 300 Fed. 961; *McCaughn* v. *Carver*, (C. C. A. 3) 19 F. 2d 126; *Stubblefield* v. *U. S.*, (Court of Claims) 6 F. Supp. 440; *Mason* v. *U. S.*, (D. Ct. Fla.) 17 F. 2d 317.

[9] *Burnet* v. *Guggenheim*, 288 U. S. 286; *Sanford's Estate* v. *Commissioner*, 308 U. S. 39.

In this case we are concerned only with a proper interpretation of the gift tax law. The government contends that because the estate law says one thing the gift law should say the same. Perhaps it should but, if so, the remedy is with Congress rather than the courts. *Commissioner* v. *Beck's Estate, supra.* Had Congress intended the interpretative restriction placed around the estate tax to likewise apply to the gift tax, it doubtless would have plainly said so. Its omission to impose such a restriction upon *inter vivos* transactions must have been deliberate and intentional and we think the committee reports so indicate. This court will not ordinarily go beyond committee reports to construe a federal statute.[10] The scope and limitation of the estate tax amendment is quite forcefully indicated by the illustrative example given in the committee report on section 804.[11] The Revenue Act of 1926 had required the interest of a surviving spouse, such as dower, to be included in any valuation of a decedent's gross estate and the 1932 amendment was intended to make that provision plain beyond preadventure; it undertook to emphasize that an agreement providing for the widow to accept a stated sum in lieu of dower should not operate to exclude from the gross estate the value of her dower rights. Her claim in such circumstances is not to be considered for estate tax purposes as one deductible from the gross estate. There is nothing to indicate that Congress intended to inject such dower provision into the gift tax law or promulgate any new rule governing *bona fide, inter vivos* transactions, actually consummated between husband and wife or, as in this case, between parties contemplating matrimony. To the contrary, there is every indication that

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[10] *Lapina* v. *Williams*, 232 U. S. 78, 58 L. Ed. 515.

[11] Shown in appendix, *infra*, page 30.

Congress intended the gift taxing statute to be a complete legislative enactment in its own right. Congress knew of the above mentioned federal decisions holding the wife's relinquishment of her statutory rights to be a money's worth consideration and did not see fit to disturb that rule for gift tax purposes. We are not here dealing with an agreement to become effective only after death—we are dealing with a consideration executed while the parties are alive, in good health and with a considerable life expectancy; nor is their good faith questioned by the government.

We are not without authority to support our viewpoint. The opinion of the board of tax appeals in the case of *Bennet B. Bristol* v. *Commissioner of Internal Revenue*, 42 B. T. A. 263, adopted the same theory and reasoning. On the facts that case was quite similar to the case at bar and it was said in the opinion rendered that:

> "The gift tax under consideration was imposed by the Revenue Act of 1932, the same act that amended the 1926 Act respecting estate tax as above noted. Both the gift tax provisions and the estate tax amendment were considered in the same Congressional Committee reports. Nevertheless, the amendment was made specifically applicable to the estate tax and was omitted from the gift tax provisions. The only logical conclusion in the light of such facts is that, with both taxes before it, the Congress did not intend the interpretative restriction placed around the estate tax to apply to the gift tax and that the omission thereof from the gift tax provisions was deliberate. We are of the opinion, accordingly, that the relinquishment of dower or other marital rights may, under the gift tax statute, be adequate and full consideration in money or money's worth. The adequacy of the consideration in a given case is a question of fact."

While it is true that this decision of the board of tax appeals was later reversed by the Circuit Court of Appeals for the First Circuit (121 F. 2d 129), the viewpoint of that court upon this question of Congressional intent and statutory construction has proved unpalatable to the tax court (*Jones, Petitioner*, v. *Commissioner*, 1 T. C. 1207; *Wemyss, Petitioner*, v. *Commissioner*, 2 T. C. No. 111) and has been rejected by the Court of Appeals for the Seventh Circuit (*Lasker* v. *Commissioner*, 138 F. 2d 989). In the instant case such a theory was rejected by the district court and even the Fifth Circuit Court of Appeals pushed it aside.

We submit that Congress did not intend for the interpretative restriction placed around the estate tax to apply to the gift tax law.

This brings us to the next proposition which is that:

In bona fide transactions between parties contemplating matrimony, release of the wifes statutory rights may (within the purview of Section 503, Revenue Act of 1932), constitute an adequate and full money's worth consideration for a contemporaneous transfer of property by the husband.

In the instant case, petitioner's transfer of $300,000 to the trust has been adjudged a gift and taxed as a gift; and this notwithstanding the complete absence of donative intent and the fact that the parties admittedly (R. 7) dealt in good faith. The commissioner has defined gifts as excluding arm's length business transactions in which there was no donative intent; Regulations 79, Articles 1, 2 and 8, approved February 26, 1936. Certainly this transfer does not conform to the term "gift" as that word is customarily used and understood and yet it was said in *Commissioner* v. *Montague*, (C. C. A. 6) 126 F. 2d 948, 951:

> "The word 'gift' is not defined in the act; therefore it is to be understood in its ordinary signification."

And, further:

> "The word 'gift' is usually defined as a voluntary transfer of property by one to another without any consideration or compensation therefor. A 'gift' is a gratuity and not only does not require consideration, but there can be none. If there is a consideration for the transaction, it is not a 'gift.'"

To same effect see *Ellerson* v. *Grove*, (C. C. A. 4) 44 F. 2d 493.

To circumvent this barrier, respondent argues that there was here no consideration and there could be no consideration such as the act contemplates, because no money value whatsoever may be attached to the statutory rights relinquished by the wife. The contention in the circuit court of appeals was that "the statute does not contemplate that the release of such rights shall constitute consideration to *any* extent." That seems to be the real debatable point upon which the government relies to sustain the tax for, if it is possible to place a money or money's worth value upon such rights, it was by the original stipulation agreed (R. 9) that the formula and computation of that value as submitted by petitioner to the trial court is correct.

It may be advisable to first consider what is contemplated by the words "consideration in money or money's worth."

In Restatement of the Law of Contracts, page 80, Section 75, we find the following definition of "consideration":

> "Consideration for a promise is (a) an act other than a promise, or (b) a forebearance, or (c) the

creation, modification or destruction or a legal relation, or (d) a return promise, bargained for and given in exchange for the promise."

And in *Turner* v. *Commissioner*, (C. C. A. 3) 85 F. 2d 919, it was pointed out that "money's worth" within the meaning of the statute does not mean money itself; the ultimate question is what may be regarded as money's worth. In that case a claim against a decedent's estate was held deductible as one "contracted for adequate and full consideration in money or money's worth or as a transfer to a religious, charitable or educational association."

In *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, 84 L. Ed. 20, this court said in part:

> "When the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title."

The court was undoubtedly speaking of a transfer by the donor; but in determining whether such transfer should be classified as a gift or as an exchange for consideration, the same test is applicable. Accordingly the rule may be stated in reverse somewhat as follows: "The essence of money's worth consideration for a transfer is the passage of control over the economic benefits of the consideration rather than any technical changes in the title."

If this thought be considered in connection with petitioner's acquisition of his wife's statutory rights, it becomes readily apparent that those rights did represent a money's worth consideration flowing to him in exchange for the money he transferred to the trust.

The same thought may be further developed in this wise: Assume the case of a man and woman, both wealthy. They contemplate matrimony and she, desiring to avoid any further accumulation, by valid agreement and

for a nominal consideration, releases to him all of her marital rights in his property and estate. Does this transfer by her escape the gift tax because no money value may be assigned to the marital rights she releases? A factual situation quite similar to the one assumed (without the tax angle) was recently presented to the Supreme Court of Florida in *North* v. *Ringling*, 149 Fla. 739, 7 So. 2d 476.

If a man who transfers property to his wife in settlement of her marital rights does not thereby make a gift but achieves a capital gain liable to be taxed as income, as has been repeatedly held (*Commissioner* v. *Mesta*, (C. C. A. 3) 123 F. 2d 986; *Commissioner* v. *Halliwell*, (C. C. A. 2) 131 F. 2d 642), then it is difficult to see how money paid under prenuptial agreement for the relinquishment of similar rights may be classed as a mere gift. While, in the latter case, no question of capital gain enters the picture, a parity of reasoning must necessarily put all of such transactions in the same category, viz., that of arm's length business dealings for consideration and profit. In its effort to obtain revenue, the Treasury Department has not always been consistent in its positions.

But there is another and more compelling reason for believing that the wife's release of her marital rights may properly be considered and treated as a money's worth consideration and this is because of the case history of the subject as related to the enactment of the gift tax law.

As far back as 1924, the Court of Appeals for the Third Circuit decided in a case quite similar to this one, where the parties had made a prenuptial agreement and created a trust, that the transaction was of a business character, a *bona fide* sale or exchange, and that the dower rights released by the wife were consideration in *money or money's worth*, within the true intent and meaning of the federal statute, for the bonds delivered by

the husband to the trust. *Ferguson* v. *Dickson*, (C. C. A. 3) 300 Fed. 961.

The next decision was in 1927, the case of *McCaughn, Collector*, v. *Carver*, also by the Third Circuit, and reported in 19 F. 2d 126. It was there held that where the husband had made an irrevocable transfer of a fund in trust in consideration of the wife's relinquishment of her dower, a tax paid under protest was recoverable because the circumstances disclosed a *bona fide* sale for a *fair consideration in money or money's worth.*

Next came *Stubblefield* v. *United States*, decided by the court of claims in 1934, and reported in 6 F. Supp. 440. The suit was to recover an estate tax said to have been illegally assessed and collected under the Revenue Act of 1924. It was there held that when the wife of a grantor exacted a portion of the purchase price for surrendering her inchoate dower rights, the money received by her in the transaction was based on consideration and was not a gift. A similar holding had been made in 1926 by the District Court for the Southern District of Florida in the case of *Mason* v. *United States*, reported in 17 F. 2d 317.

While the several decisions above mentioned involved laws in effect prior to 1932, when the present gift tax statute was enacted, they are none the less valuable as precedents; for they dealt with *inter vivos* transactions alleged to have been without consideration, mere gifts, and effort was made to bring them within the scope of the statute taxing transfers other than those made *bona fide* and for a *money's worth consideration.* When the gift statute was enacted in 1932, Congress inserted substantially the same phraseology, *viz.*: "where property is transferred for less than an adequate and full consideration in money or money's worth" and it necessarily knew the federal courts had theretofore accorded to marital

rights the status of a money's worth consideration. Congress must be considered to have adopted the consistent interpretation theretofore placed upon the language it used, *United States* v. *Ryan*, 284 U. S. 167, 76 L. Ed. 224.

It is true Congress had in 1926 amended the estate tax law to specify that any such consideration should be "full and adequate" rather than merely "fair" but if such rights were a money's worth consideration before that amendment, as had been held, they were none the less so after it—the amendment merely served to impose upon the courts the duty of measuring and evaluating the consideration in each particular case. *Bristol* v. *Commissioner*, 42 B. T. A. 263; Hughes, Federal Death Tax, Section 240, page 493.

Since 1932 cases have arisen and decisions have been rendered which cast doubt and confusion upon the correct interpretation of the gift taxing statute.

The case of *Empire Trust Company* v. *Commissioner*, (C. C. A. 4) 94 F. 2d 307, was decided January 4, 1938. It involved an *estate tax* but should be mentioned because it has been cited as a precedent of some importance. We cannot see that it has any proper bearing upon or relation to the gift tax law. It is true the parties had there made a prenuptial agreement to fix the value of the wife's dower estate but nothing was paid her or agreed to be paid her by the husband unless she should survive him. He having died and the specified payment having been made to the widow, the executors asserted the payment as a deductible claim; this, however, was contrary to the estate law which expressly required that the gross estate include the value of any such dower interest. Because and only because of this express statutory provision the claim was held non-deductible. The court did not hold that dower rights released may not constitute a money's worth consideration for a contemporaneous *inter vivos*

transfer—it said in effect that that was not the case before the court.

We have previously referred to the B. T. A. decision in *Bristol* v. *Commissioner*, 42 B. T. A. 263. That case was quite similar to this and the board favored the taxpayer. We think its reasoning logical and its decision sound; but the First Circuit Court of Appeals thought otherwise, hence the reversal in *Commissioner* v. *Bristol*, (C. C. A. 1) 121 F. 2d 129. We believe this is the chief authority upon which the government can rely.

Without dwelling in detail upon the reasoning of the appellate court in the Bristol case but here noticing one of the principal theories therein advanced, we maintain that a valid and non-taxable transfer does not necessarily contemplate receipt by the transferor of something of equal money value, so as to leave his net worth as much as it was before the transaction was consummated. To so hold would be to re-define "consideration" by writing into the law a provision which Congress has not inserted —*U. S.* v. *Mitchell*, (C. C. A. 7) 74 F. 2d 571. In discussing the same point as related to estate taxes, Mr. Paul[12] says:

> "The courts have held, as a rule, that consideration need not flow directly to the decedent or to his estate."

And Mr. Hughes[13] says:

> "The law does not require that the consideration be paid to the donor in order that it may swell his estate and the court should not add such a provision to the law by judicial construction."
>
> Citing, *U. S.* v. *Mitchell, supra.*

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[12]Paul on Federal Estate and Gift Taxation, Sec. 11.20, at page 602.

[13]Hughes, Federal Death Tax, Sec. 93, at page 152.

So, in the case at bar, the taxable nature of the transaction is not to be determined on the basis that while Mr. Merrill transferred funds to the trust, his wife merely relinquished her property claims. The question is whether the rights she released had a value to him commensurate with the property he transferred. The First Circuit Court of Appeals in the *Bristol Case, supra*, held such marital rights to be incapable of valuation in terms of money, but in so doing it departed from precedents and promulgated a new rule which other federal courts have since been unwilling to follow.

The tax court is far from convinced of the soundness of the reasoning in the Bristol case. Commenting thereon, it said in *Jones* v. *Commissioner*, 1 T. C. 1207:

> "We have not, however, departed from the view expressed in our opinion in that (Bristol) case."

To the same effect see the decision and reasoning in *Wemyss* v. *Commissioner*, 2 T. C. No. 111.

The views of the tax court are entitled to considerable weight upon questions of this character. *Dobson* v. *Commissioner*, ... U. S. ..., 88 L. Ed. 179.

In the *Wemyss Case, supra*, the tax court decision was rendered against the taxpayer, upon the peculiar facts there involved. On appeal however the case was reversed (*Wemyss* v. *Commissioner*, 144 F. 2d 78), and these propositions announced: (1) A transfer pursuant to prenuptial agreement is a *bona fide* business transaction, not a gift, (2) Such transfers are not in contemplation of death but of life, (3) The consideration requirement may be met by showing a detriment suffered by the wife; it is immaterial that no consideration flows directly to the husband for his transfer, (4) Such a detriment is definitely measurable in money or money's worth, (5) Before the government may tax for a gift, a donative intent must exist,

(6) The reasoning of the *Lasker Decision* (*infra*) concurred in and approved.

The Bristol case, on appeal was decided June 27, 1941, and on June 3, 1942, the same court (CCA-1) decided *Commissioner* v. *State Street Trust Company*, reported in, 128 F. 2d 618.

The issue in that case was said to be:

> "Whether a claim for monthly payments to a wife for life in satisfaction of her right to alimony or otherwise under a divorce decree which is subject to modification on her remarriage is an allowable deduction in a deceased husband's estate tax return under Section 303(a) and (d) of the Revenue Act of 1926, as amended."

It was there held that a decree by a Massachusetts Court, granting a divorced wife an annuity, created a liability on the part of the husband which was deductible for estate tax purposes, in spite of the fact that the decree really provided for the payment by the husband to the wife of amounts for her marital rights. The decision seems to have been upon the theory the statute contemplates that amounts paid for the relinquishment of marital rights are not deductible where the payments are founded upon a promise or agreement but may be deducted where the payment was founded on a decree of court.

If the reasoning of the State Street Trust Company case is sound, it would seem that if Mr. Merrill had not created the trust for Mrs. Merrill pursuant to the prenuptial agreement and she had brought an action for specific performance and he had been required by court decree to perform, there would have been no taxable gift inasmuch as he was required by the court to do what he had previously contracted to do. Since there is no provision in the gift tax law that relinquishment of marital rights may not

be good and sufficient consideration (whether this relinquishment be pursuant to agreement or a court decree) we fail to see why the parties should be penalized because they would not resort to the obvious subterfuge of having Mr. Merrill refuse to create a trust and then arranging for Mrs. Merrill to bring an action for specific performance and obtain decree ordering him to do so.

On December 4th, 1943, the Seventh Circuit Court of Appeals decided *Lasker* v. *Commissioner*, 138 F. 2d 989, where gift tax was sought to be imposed because the husband, shortly after marriage and preliminary to a divorce proceeding, made a cash settlement with the wife in discharge of an ante-nuptial agreement and in order to obtain release of her statutory marital rights. It was held that he received for the sums paid adequate and full consideration in money or money's worth within the gift tax statute and that the payment was not subject to gift tax. The court noticed not only the Bristol case, but also the Jones and Merrill cases, saying in part:

> "The Bristol case is predicated upon a holding (page 135) contrary to that of the tax court that a certain proviso directed expressly at the estate tax provisions is also applicable to the gift tax provisions.
>
> The tax court, in *Jones* v. *Commissioner*, 1 T. C. 1207, decided subsequent to the instant case, again refused to follow the Bristol case, in the respect above stated."
>
> • • • • • • •
>
> "Not only has the tax court refused to follow the reasoning of the Bristol case, but so has the district court in *Merrill* v. *Fahs, Collector*, (D. C.) 51 F. Supp. 120. *We agree with the reasons given by the court in the latter case for its refusal to follow the Bristol case.*"

In the case at bar the district court considered (R. 52-57) that the release by Mrs. Merrill of her statutory rights might and did constitute a money's worth consideration for petitioner's transfer of funds to the trust and thereupon valued those rights to its entire satisfaction. Its calculation was based upon the admitted net worth of petitioner considered in the light of the respective ages and life expectancies of petitioner and wife and the actuarial formula introduced in evidence. As previously observed it was by the stipulation (R. 9) agreed: "that the formula and computation is correct, if it is possible to place a money value upon the wife's dower interest, under the facts in this case."

The Circuit Court of Appeals, reversing the District Court, held that the amount of the transfer should have been included in petitioner's gift tax return on the ground that the consideration for the transfer was not susceptible of accurate monetary measurement and therefore that its adequacy could not be and was not here established (R. 67-72). A dissenting member of the court was of the view (R. 72-77) that the consideration was susceptible of evaluation and that its adequacy had been established.

It would seem that we have here two questions which shade into each other; the one being the government's contention that such marital rights may not, within the contemplation of the statute, constitute consideration to *any* extent and the other being the view taken by the Fifth Circuit Court (majority opinion) that such rights, because of their future and contingent nature, are not susceptible of accurate mathematical measurement. It is possible that this is merely a distinction without a difference. The government contends, as we understand, only for the proposition stated by it; consequently we will refrain from discussing the great array of cases which deal with valuation problems where there is admittedly

some consideration of money's worth.[14] If the Circuit Court of Appeals considered the case to present merely a problem of measurement, then it erred in reversing the judgment because no such problem was presented to it —as has been observed we had stipulated with the government upon an appropriate valuation formula. Such a method of evaluation has often received judicial sanction and is approved of by the Treasury Department, Reg. 79, Art. 19; *Bristol* v. *Commissioner*, 42 B. T. A. 263; *Jones* v. *Commissioner*, 1 T. C. 1207; *Wemyss* v. *Commissioner*, 2 T. C. No. 111; *Lasker* v. *Commissioner*, (C. C. A. 7) 138 F. 2d 989; *Commissioner* v. *Hart*, (C. C. A. 3) 106 F. 2d 269; *Guggenheim* v. *Helvering*, (C. C. A. 2) 117 F. 2d 469; *Commissioner* v. *Mesta*, (C. C. A. 3) 123 F. 2d 986; *Commissioner* v. *Marshall*, (C. C. A. 2) 125 F. 2d 943; *Smith* v. *Shaughnessy*, 318 U. S. 176, 87 L. Ed. 504.

Furthermore, the record in this case (R. 6, 10, 11) shows that petitioner and Miss Desmare, each being represented by individual counsel, negotiated at arm's length and after full and fair disclosures of finances agreed upon an appropriate consideration to be paid by petitioner and received by his wife for her marital rights. The district court, after full consideration of the evidence, found that petitioner had benefited, financially speaking, by this exchange of properties. Under the circumstances we think, as the tax court thought in *Jones* v. *Commissioner, supra*, that section 503 "can scarcely mean that all arm's length business transactions, involving transfers of property, shall be subjected to scrutiny and, in every case where one party makes a bad bargain, he should have his misfortune increased by the imposition of a gift tax on his unfavorable balance from the transaction. The tax is imposed

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[14]Paul on Federal Estate and Gift Taxation, Volume II, Chapter 18.

by authority of section 501. It is expressly limited to transfers 'by gift.' 'Gift' is not defined in the statute. The respondent, however, has himself defined the term as used in the controlling statute as excluding arm's length business transactions, such as is evidenced here, in which there was no donative intent."

CONCLUSION.

In the instant case, the theory of the district court in awarding judgment for petitioner was that the language of the gift law is plain, that Congress knew what it was doing when it used language different from that inserted in the estate law, that while each of those laws supplements the other no complete integration of their provisions was intended, that only gifts and not *bona fide* property exchanges were intended to be taxed, that the release by a wife of her statutory rights for a contemporaneous cash consideration paid her by the husband may be a *bona fide* property exchange and such rights of the wife are susceptible of valuation in terms of money, that the courts should not abdicate their function of deciding valuation questions merely because mathematical accuracy in the result may be difficult. Upon a consideration of all of the evidence in this case it found that the particular rights relinquished by Mrs. Merrill were a full and adequate equivalent in money's worth for the sum transferred by petitioner to the irrevocable trust.

We think the theory and reasoning of the district court was sound and submit that the Fifth Circuit Court of Appeals erred in reversing the trial court's judgment.

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HARRY T. GRAY,
Of Counsel.

APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

TITLE III - GIFT TAX.

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *

* * * * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Revenue Act of 1932:

TITLE VI - ESTATE TAX AMENDMENTS.

SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'"

Excerpt from Congressional Committee Reports, 72d Congress, Revenue Bill of 1932.

TITLE III - GIFT TAX

SECTION 503. TRANSFERS FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Since the tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000.

TITLE VI - ESTATE TAX AMENDMENTS.

SECTION 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

This amendment excludes, in determining "consideration in money or money's worth," the value of a relinquished, or a promised relinquishment of, dower, curtesy, or other marital rights in decedent's property. Section 302 (a) and (b) of the 1926 act require the value of such an interest to be included in the gross estate, and, if its value may, in whole or in part, constitute a consideration for an otherwise taxable transfer (as has been held to be so), or an otherwise unallowable deduction from the

gross estate, the effect produced amounts to a subversion of the legislative intent expressed in section 302 (a) and (b).

For example, a decedent dies leaving an estate of $1,500,000 (after payment of all charges), and under the State law the surviving spouse is entitled to one-third, or $500,000, of which she can not be deprived by will without her consent. Under existing law, the estate is entitled to no deduction on account of her statutory rights, but, if she and decedent had entered into a contract by which she was to receive from his estate a stated sum in consideration of a waiver of her statutory rights, the amount due her under the contract might be held a deductible claim against the estate as having been contracted for an adequate and full consideration in money's worth, namely, the value of her waived marital rights.

* * * * * * *

Treasury Regulations 79 (1936 ed.):

> Article 1. *Imposition of tax.*—* * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. * * *
>
> Art. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length, and free

from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

The Florida Statute.

Section 5507(1), C. G. L., as it was in effect at the date of the prenuptial agreement, read as follows:

"5507(1). Dower in realty and personalty.—Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her said husband, or both, she may elect, in the manner hereinafter provided, to take dower, which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges, and expenses of administration: Provided, however, that if a decedent be survived by his widow and lineal descendants and that none of such lineal descendants are also the lineal descendants of such widow, then the dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to-wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration: Provided, further that nothing herein contained shall be construed as impairing the

validity of the lien of any duly recorded mortgage or the lien of any person in possession of personal property. The homestead shall not be included in the property subject to dower but shall descend as otherwise provided in this law for the descent of homesteads (Ch. 16103, Acts, 1933, Sec. 35; Ch. 17171, Acts, 1935, Sec. 1; Ch. 18066, Acts, 1937, Sec. 1)."

Dower in Florida—Interpretation.

The following excerpts are from *Smith* v. *Hines*, 10 Fla. 258:

"So it is the opinion of this Court, that in this State the law—that is to say, the common law and statute—by its own silent operation, raises a provision for the wife in the event of her surviving her husband, independent of, and without reference to, the agreement of the parties; consequently, the right of the wife to dower is not derived through the husband, but by provision of law. It is an interest which the law casts upon the wife."

• • • • • • •

"A right to dower is an interest contingent during the life of the husband, but rendered absolute by his death. Now, our statute having extended dower to personal estate, she has the same inchoate estate in personal property that she has in real, excepting, in personal estate, it is not provided she shall have it in that which he 'had before conveyed,' as in lands; but, in the 3d section, providing the manner of proceeding to have dower set apart, it is stated that the sheriff and commissioners 'shall also, at the same time, allot and set off to such widow her portion of the personal estate of which her husband died possessed.' From this view, it follows that the right of dower in personal property, in this State, is an inchoate interest, contingent during the life of the husband, but rendered absolute by his death. The right is of a double contingency, viz.: he may, before death, sell or give it away, and she may not survive him.

"If we are correct in our definition of the interest of the wife, by way of dower in personal property, it seems clear that the question, whether her husband has or has not *bona fide* conveyed or sold his personal property, is one that she can contest—certainly as much as the widow can, in those States where dower in lands is only given in those lands of which the husband shall die seized and possessed. In the latter, the books are full of decisions that the widow may contest whether her husband has, in his life-time, *bona fide* conveyed."

* * * * * * *

"Thus it will be seen that, under our statute, the right of dower or dower interest of the widow, in the personal estate of her husband, are preferred rights—her claim stands higher than that of a creditor. If, then, the widow has a right to dower, which is cast upon her by law, and if that right is a preferred one—one that stands above all other claims, even higher than creditors—we ask, does she derive this right through her husband, the intestate, as in the case of an heir or administrator? We think not. It seems to us her claim is antagonistical to the estate of her husband—she had a contingent lien before his death. The principle under which an heir or administrator cannot set up title against voluntary deed of ancestor, is because the administrator stands in the place of the intestate, and has no greater or other rights than the person he represents, and the heir derives through the ancestor and has no greater or other right than the ancestor, and, in both cases, they had no inchoate title before his death. The ancestor could not avoid a gift made by covin and fraud, although under the statute of 13 Eliz., which we have enacted in this State, it would be void as to creditors—so cannot the heir or administrator, because they represent the ancestor, and because they had not, in his life-time, even an inchoate interest. But, it may be asked, does not the widow, like the heir, get her share out of the personal property left by the hus-

band? The answer is, that although, like the heir, she takes it out of the estate left by the husband, yet, unlike the heir, she cannot have her claim defeated by last will and testament, nor does she receive it under the law of descent and distribution. No doubt any *bona fide* sale or gift of personal property, made by the husband in his life-time, would affect the wife's claim for dower, as it would be binding upon the heir. We do not wish to be understood as intimating or asserting that the husband is restricted by any claim which the law casts upon the wife as dower, from making sale or gift of his personal property during his life-time, providing it is not done by will; but we do hold that such sale or gift must be a *bona fide* one—not a sham or pretence of sale or gift—and one which the husband cannot take back, and is not to take effect, in case some specified event does not happen."

No. 126

In the Supreme Court of the United States

OCTOBER TERM, 1944

CHARLES E. MERRILL, PETITIONER

v.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the District Court (R. 65–71) is reported at 51 F. Supp. 120. The opinion of the Circuit Court of Appeals (R. 87-92) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 3, 1944 (R. 98). Petition for a writ of certiorari was filed June 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1939 the petitioner transferred funds to an irrevocable trust for the benefit of his wife in accordance with the terms of an antenuptial agreement between them.

The question is whether the amount of this transfer is taxable as a gift under the provisions of Section 501 of the Revenue Act of 1932; the answer depends upon whether the transfer was made upon "adequate and full consideration in money or money's worth" within the meaning of Section 503 of that Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 18–21.

STATEMENT

The facts which were found by the District Court (R. 57–64) from the parties' stipulation (R. 7–12) and from certain documentary exhibits (R. 12–56) may be stated as follows:

The petitioner was born in 1885 in Florida, of which state he was a citizen during the pertinent taxable year. He was a citizen of New York, however, at the time of the proceedings herein. (R. 57.)

On March 8, 1939, petitioner was married to one Kinta Desmare at Pensacola, Florida. At the time of the marriage petitioner was possessed of some $5,000,000 worth of property; Miss Des-

mare's net financial worth at that time was negligible. (R. 57.)

Miss Desmare had never previously been married but petitioner theretofore had been twice married and divorced. By the first wife he had two children, both of whom were then living and one of whom was married and had two children. Petitioner also had another child living, the issue of his second marriage. Shortly before his marriage to Miss Desmare petitioner had been called upon to defend a divorce proceeding in which heavy money demands were made upon him by his second wife; he desired to safeguard and protect his dependents against future contingencies and the obligations which he had. (R. 57.)

Before making any definite matrimonial arrangements with Miss Desmare, petitioner consulted his attorney with reference to the Florida dower statute and the feasibility of making a valid prenuptial agreement to adjust property rights between himself and his prospective wife. Being informed as to such matters, petitioner told Miss Desmare of his previous marital affairs and of his desire to provide for his family by previous marriages. He also advised her of his financial condition and the nature of his business and informed her of his wish to enter into a prenuptial agreement. (R. 57–58.)

Miss Desmare was agreeable to the idea and preferred some form of immediate payment in

consideration and exchange for any statutory dower, widow's allowance, or other rights to which she would become entitled by the contemplated marriage (R. 58).

As a result of these conferences an antenuptial agreement was prepared and executed by the parties at Pensacola, Florida, on March 7, 1939, the day prior to their marriage (R. 12–19). After reciting (R. 12–14) the reasons and motives of the contracting parties, the antenuptial agreement stated (R. 14–16)—

> That in consideration of the premises and of the solemnization of the aforesaid intended marriage and of the sum of One ($1.00) Dollar paid by the first party [taxpayer] to the second party [Miss Desmare] * * *
>
> I
>
> * * * [the second party] has granted, remised, released, relinquished, conveyed and forever quit-claimed and by these presents does grant, remise, release, relinquish, convey and forever quit-claim upon the said Charles E. Merrill, party of the first part, his heirs, personal representatives and assigns:
>
> (a) All of the right, title and interest which she may acquire as wife or widow of the first party in all of the lands, tenements and hereditaments of which the first party may be seized at the time of the marriage of the parties or at any time thereafter.

(b) All of the right, title and interest which she may acquire as the wife or widow of the first party in and to any and all personal property, tangible or intangible, which the first party may own at the time of the marriage or at any time thereafter.

This conveyance includes all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowance. Second party hereby waives, discharges and releases every interest, claim or demand of whatsoever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned by the first party; so that neither the second party nor her heirs, executors, administrators or assigns, or any of them, shall have or be entitled to assert any right, claim or demand whatsoever against any of the properties or estate of the first party but shall be forever barred and excluded therefrom.

The second party agrees that she will at any time and from time to time upon the request of the first party or his heirs, executors, administrators or assigns, execute, acknowledge and deliver any and all mortgages, deeds of conveyance, bills of sale or instruments of release of any of the real or personal property of which the first party may be seized or possessed at the time of

the marriage of the parties or at any time thereafter, so that such mortgages or instruments of conveyance or release when executed and recorded, may show good record title to the properties thereby encumbered, conveyed or affected: The first party or his heirs, executors, administrators or assigns, shall nevertheless have the right to encumber or convey or otherwise deal with reference to any or all of such real or personal properties without the second party joining in the mortgages or instruments of conveyance and every such mortgage or other instrument, without the signature of the second party, shall fully and effectively encumber or convey or operate upon the property affected thereby.

Petitioner's undertakings, as set forth in the antenuptial agreement (R. 16–18), included the following (R. 16, 59–60):

(a) That within ninety days from the date of said marriage, he will create an irrevocable trust, of $300,000.00 in cash or securities of equivalent value, the provisions of which shall conform to the wishes heretofore expressed by the said Kinta Desmare, that is to say the trust indenture shall provide for the said Kinta Desmare to receive during and throughout her lifetime the net annual income from said trust funds, such income to be paid her quarterly; upon the death of the said Kinta Desmare, if she be survived by her mother Mrs.

> Louis Desmare, the income from the trust funds to be paid to said mother during and throughout her lifetime; upon the death of the said Kinta Desmare, if she be not survived by her mother or upon the death of the latter, if she shall survive her said daughter, the entire trust estate to become the property of and the principal and net income therefrom to be disbursed and paid as follows * * *.

In addition to the foregoing, petitioner agreed to provide by will an additional trust of $300,000 for Miss Desmare's benefit; a testamentary trust in that amount was also to be created by him for the benefit of their issue if any (R. 17–18).

The contract provided for its construction in accordance with the laws of the State of Florida (R. 60).

Pursuant to this agreement petitioner created an irrevocable trust to which he transferred $300,000 in cash on May 29, 1939.[1] On that date also petitioner executed his will which contained clauses designed to carry out the additional provisions of the ante-nuptial contract (R. 60–61). Prior to their execution, the trust indenture and will were approved by the personal attorney of the third Mrs. Merrill, as conforming in all respects to the requirements of the agreement (R. 61).

---

[1] The terms of the trust are set forth at pp. 19–27 of the record.

The several transactions between petitioner and Kinta Desmare were entered into in good faith (R. 61).

On May 29, 1939, when the $300,000 was transferred to the Desmare trust, petitioner's net worth (apart from the creation of the trust fund on that date) was approximately the same as it had been on March 7, 1939, the date of execution of the pre-nuptial contract, and on March 8, 1939, the date of petitioner's marriage to Miss Desmare (R. 57, 61). His assets consisted principally of cash, stocks, bonds, and similar securities of a value in excess of $5,300,000. In addition he owned his Palm Beach home valued at $100,000 and other Florida real property valued at $35,000 (R. 61).

The dower statute of Florida in effect at the date of the prenuptial agreement was Section 5507 (1), Compiled General Laws of Florida. It specified (R. 61–62) that the widow of any decedent might elect to take dower—

> which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the de-

cedent, all estate and inheritance taxes and all costs, charges and expenses of administration: Provided, however, that if a decedent be survived by his widow, and lineal descendants and that none of such lineal descendants are also the lineal descedents of such widow, then the dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration.

The dower statute was changed on April 21, 1939, to subject the widow's rights to the husband's debts and to estate taxes.[2]

On March 7, 1939, the date of execution of the prenuptial contract, Miss Desmare was 35 years of age and petitioner was 53 (R. 57, 62). An actuarial calculation based upon the Actuaries or Combined Experience Table of Mortality, with interest at 4 percent, was introduced into evidence before the District Court under a stipulation of the parties admitting its correctness "if it is possible to place a money value upon the wife's dower interest under the facts in this case"; the calculation showed that the reversionary interest of a person aged 35 in a fund becoming payable upon

[2] Fla. Laws, 1939, p. 16, c. 18999.

the death of a person aged 53 per $1 of the fund is .422604 (R. 62).

On May 11, 1940, petitioner filed with the Commissioner of Internal Revenue his gift tax return for the year 1939 in which he reported the creation of the irrevocable trust and the transfer to it of $300,000, and stated that (R. 62–63):

> This trust was created pursuant to an ante-nuptial agreement executed March 7, 1939 between the taxpayer and his wife, wherein, in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property, the taxpayer agreed to create this trust for the benefit of his wife, her mother, and the remaindermen designated by Mrs. Merrill in said agreement * * *
>
> In view of the net worth of the taxpayer and the value of the real estate and other property owned by him at the time the trust was created and the other circumstances set forth in said ante-nuptial agreement, and in view of the absence of any donative intent on the part of the taxpayer, he has excluded the amount of the transfer to this trust from Schedule A of the Gift Tax Return for 1939 on the ground that the relinquishment by Mrs. Merrill of her inchoate dower and other marital rights in his property constituted a valuable consideration in money or money's worth at least equal to

> the sum of $300,000, the amount transferred to the trust in question.

Mrs. Merrill also filed a timely gift tax return for the year 1939, reporting the trust created for her pursuant to the antenuptial agreement and saying (R. 63)—

> The taxpayer is advised that she became a purchaser of the corpus of this trust for a consideration commensurate with the amount of said corpus, to wit, $300,000.

In filing their income tax returns for the calendar year 1939, neither taxpayer nor his wife, the former Kinta Desmare, reported income or profit on these transactions (R. 63).

The Commissioner assessed the instant gift tax deficiency on the ground that petitioner's transfer of $300,000 to the trust in 1939 was subject to the gift tax for that year. Petitioner paid the amount so assessed, filed due claim for refund, and instituted this suit upon the Commissioner's rejection of the claim. (R. 63–64.) The District Court held (R. 64 *et seq.*) that the release of a wife's statutory property rights may constitute full and adequate consideration in money or money's worth for a transfer to her by the husband, within the meaning of Section 503 of the Revenue Act of 1932; that whether or not it does constitute such consideration is a question of fact; and that in the case at bar the evidence established that Miss Desmare's release of her statutory rights under the prenuptial agreement did constitute

adequate and full consideration in money or money's worth for the transfer by petitioner in 1939 of the $300,000 here involved.

The Circuit Court of Appeals, reversing the District Court, held that the amount of the transfer should have been included in petitioner's gift tax return on the ground that the consideration for the transfer was not susceptible of monetary evaluation and therefore that its adequacy could not be and was not here established (R. 87–92). A dissenting opinion below (R. 92–97) was of the view that the consideration was susceptible of evaluation and that its adequacy had been established.

ARGUMENT

The Government contends that this case was correctly decided below and that it is distinguishable from the Circuit Court of Appeals decisions which petitioner (Pet. 5) asserts to be opposed.[3] However, the importance of the question presented is conceded; and it may also be admitted that a conflict exists between the reasoning of the court

[3] The cases cited by petitioner (Pet. 5) as conflicting with this one [*McCaughn* v. *Carver*, 19 F. 2d 126 (C. C. A. 3d); *Ferguson* v. *Dickson*, 300 Fed. 961 (C. C. A. 3d); *Stubblefield* v. *United States*, 6 F. Supp. 440 (C. Cls.)] were estate tax cases governed by earlier statutes which did not require that there should be "adequate and full," but merely that there should be "fair," consideration in money or money's worth. *Empire Trust Co.* v. *Commissioner*, 94 F. 2d 307 (C. C. A. 4th), held that a release of marital rights did not constitute "adequate and full" consideration under Section 303 (a) (1) of the Revenue Act of 1926, 44 Stat. 72, which supplanted the previous estate tax provision.

below and the view taken by the Circuit Court of Appeals for the Seventh Circuit in *Lasker* v. *Commissioner*, 138 F. 2d 989, involving a post-marital settlement.[4]

The issue is whether Section 503 of the Revenue Act of 1932 (Appendix, *infra*, p. 19), which in substance provides that if property is transferred for less than adequate and full consideration in money or money's worth, the excess shall be deemed a gift, contemplates that the release of dower, curtesy, and analogous marital rights may constitute consideration. The Circuit Court of Appeals for the First Circuit, in the case of *Commissioner* v. *Bristol*, 121 F. 2d 129, held upon facts very similar to those at bar that a release by pre-nuptial agreement of rights in a husband's property did not constitute consideration within the purview of the statute. The court reasoned from *Empire Trust Co.* v. *Commissioner* (*supra* note 3), involving a section of the Revenue Act of 1926 which was identical to the present gift tax provision; from the present express statutory exclusion of releases of marital interest as consideration under the estate tax law;[5] and from the Congressional purpose that the gift tax should

[4] A pre-marital agreement, entered into by the parties, was considered to have been abrogated under its own terms by a subsequent separation.

[5] This exclusion was added in 1932 in Section 804 of the Revenue Act of that year, Appendix, *infra*, p. 19. It was regarded as declaratory of the previous law in both the *Empire Trust Co.* case and *Commissioner* v. *Bristol*.

supplement the estate tax,[6] that a similar exclusion applied to the gift tax.[7] The Government asserted this view in the instant case and also in *Lasker* v. *Commissioner, supra.*

The court below did not pass upon this contention, resting its decision (R. 87–92) on the grounds (1) that when the prenuptial contract was entered into, the rights of the future wife in the petitioner's property were purely prospective and that all she actually gave as consideration was her consent to the marriage, which was not "money or money's worth" as the statute requires, and (2) that the taxpayer could not sustain the burden which lay upon him of proving the adequacy of the consideration moving to him where, as here, the rights released were not susceptible of accurate monetary measurement because of their future and contingent nature.[8]

---

[6] See *Smith* v. *Shaughnessy*, 318 U. S. 176; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39.

[7] The Court reversed the decision of the Board of Tax Appeals, 42 B. T. A. 263. The Board (now the Tax Court) has not followed the Court's decision in the *Bristol* case, but has reached a similar result in some instances. Cf. *Wemyss* v. *Commissioner*, 2 T. C. 876, appeal pending (C. C. A. 7th); *Jones* v. *Commissioner*, 1 T. C. 1207; *Lasker* v. *Commissioner*, 1 T. C. 208.

[8] As petitioner's prospective wife, Miss Pesmare had no rights whatever in his property. Later, as his wife, she had only inchoate rights, subject to the hazards of changes of residence, such as actually took place; changes in the Florida law, such as likewise occurred; and freedom on the part of the husband to dispose of his personalty by his own acts during his lifetime.

Thus the court below and the Circuit Court of Appeals for the First Circuit have reached the same result upon different grounds.

The decision in the *Lasker* case in the Seventh Circuit was influenced by the view, which the court thought the Government conceded, that there was adequate consideration because the transfer might be regarded as made in the ordinary course of business, at arm's length, and free from any donative intent, within the meaning of Article 8 of Treasury Regulations 79 (Appendix, *infra*, p. 20). The court expressly refused to follow the reasoning in the *Bristol* case in the First Circuit that the statutory exclusion of releases of marital interest as consideration for estate tax purposes is also applicable to the gift tax. The court further held that marital rights, including in that case the right to support, and consequently their release, may have an ascertainable monetary value which, in the particular instance, clearly exceeded the provision made for the wife. In respect to the possibility, under the statute, of attaching a monetary value to the release of marital rights in property, the two cases embody conflicting reasoning; but the *Lasker* case is distinguished by the court below because of the post-marital execution of the Lasker agreement as contrasted with the pre-marital conclusion of the agreement here. The surrender of the right to support in the *Lasker* case constitutes an additional differentiating factor.

The Government did not intend to concede in the *Lasker* case, and does not now, that marital settlements may properly be treated as transfers at arm's length in the ordinary course of business within the meaning of Article 8 of Treasury Regulations 79 (Appendix, *infra*, p. 20). If they were, it would not be necessary to estimate the value of the consideration moving from the wife at all, since such transactions, by reason of their very nature, "will be considered as made for an adequate and full consideration in money or money's worth." The petitioner does not contend that such should be the rule applicable to marital agreements.

The real questions involved in the present case are whether the clear meaning of Section 804 of the Revenue Act of 1932 (Appendix, *infra*, p. 19), in the light of its history (*supra*, p. 13), does not require that the same meaning be attached to Section 503 (Appendix, *infra*, p. 19) here involved and, if it does not, whether the nature of the marital rights relinquished does not prevent a value in money or money's worth from being assigned to them under the latter Section.

There is no square conflict between the decision below and that of any other Circuit Court of Appeals. The decision below is right for the reason advanced by the Circuit Court of Appeals for the First Circuit in the *Bristol* case and also, as the opinion below fully states (R. 91 *et seq.*),

because of the highly fluid and contingent nature of the interests released to the petitioner under the agreement in question,[9] which prevents the assignment of a monetary value to them.[10]

CONCLUSION.

The petition for a writ of certiorari may properly be denied because of the correctness of the result below and the absence of a direct conflict between this decision and that of any other Circuit Court of Appeals. The issues involved are, however, important for the future administration of the tax laws. It is apparent, despite the present absence of square conflict, that different Circuit Courts of Appeals are likely to decide similar cases involving these issues differently in the future. The Court may upon these grounds deem it wise to grant certiorari.

Respectfully submitted.

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JUNE 1944.

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[9] *Cf. Merchants Bank* v. *Commissioner*, 320 U. S. 256; *Robinette* v. *Helvering*, 318 U. S. 184; *Humes* v. *United States*, 276 U. S. 487.

[10] *Cf.* footnote 7, *supra.*

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *
>
> * * * * *
>
> SEC. 502. COMPUTATION OF TAX.
>
> The tax for each calendar year shall be an amount equal to the excess of—
>
> (1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such

calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth'."

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in

gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance * * *

* * * * *

Treasury Regulations 79 (1936 ed.):

Article 1. *Imposition of tax.*—* * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. * * *

Art. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

> Art. 22 (b) (3)–1. *Gifts and bequests.* * * * An amount of principal paid under a marriage settlement is a gift. * * *

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No. 126

In the Supreme Court of the United States

OCTOBER TERM, 1944

CHARLES E. MERRILL, PETITIONER

v.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the Southern District of Florida (R. 52–57) is reported in 51 F. Supp. 120. The opinion of the Circuit Court of Appeals (R. 67–77) is reported in 142 F. 2d 651.

JURISDICTION

The judgment of the Circuit Court of Appeals, reversing the District Court, was entered on May 3, 1944 (R. 78). Petition for a writ of certiorari was filed on June 3, 1944, and granted October 9, 1944 (R. 80). Jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, within the meaning of Sections 501 and 503 of the Revenue Act of 1932 and the applicable Treasury Regulations, the transfer by taxpayer in trust for his prospective wife was taxable as a gift, to the full extent of the $300,000 transferred, notwithstanding that it was made pursuant to an antenuptial agreement providing for a release of her statutory dower rights.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved may be found in the Appendix, *infra*, pp. 52–54.

STATEMENT

In this action taxpayer sued the defendant collector for recovery of a gift tax in the amount of $99,000 plus interest, alleged to have been erroneously and illegally assessed and collected (Complaint, R. 1–3). The issues were tried by the court without a jury. The findings of fact were based upon the parties' stipulation (R. 5–42) and certain documentary exhibits introduced by taxpayer (R. 42A–45).

The taxable year involved is 1939 (R. 45). During that year taxpayer was a citizen of Florida, but when he began this suit, he had become a citizen of New York (R. 45, 69). On March 8,

1939, taxpayer was married to Kinta Desmare in Florida (R. 45), likewise then domiciled in Florida (R. 69). On that date he was fifty-three years old and Miss Desmare was thirty-five years old (R. 45). Taxpayer had been married on two previous occasions and twice divorced. At the time of his third marriage, he had three children and two grandchildren, all of whom were then living (R. 45–46). Miss Desmare had never theretofore been married (R. 45). At the time of the marriage and of the trial, both parties were in good health (R. 46). At all times involved, taxpayer was possessed of considerable wealth. His net worth was in excess of $5,300,000, consisting of cash, stocks, bonds and similar securities. In addition, he owned a home in Palm Beach, Florida, valued at $100,000, and other real estate valued at $35,000. (R. 49.) At the time of their marriage, Miss Desmare, on the other hand, was without worldly goods. The parties stipulated and the court found that "her net worth" was "negligible" (R. 6, 46).

Shortly before his marriage to Miss Desmare, taxpayer had defended a divorce proceeding in which heavy money demands had been made upon him by his second wife (R. 46). Before making any definite matrimonial arrangement with Miss Desmare, taxpayer consulted his attorney with reference to the Florida dower statute and the feasibility of an antenuptial agreement to adjust

property rights between them; subsequently he informed her of his previous marital affairs, advised her of his financial condition and his desire to provide for his family by the previous marriages, as well as the nature of his business and his wish to enter into an antenuptial agreement with her (R. 46). On March 7, 1939, the day before the wedding, they executed a written agreement in Florida (R. 46). It is prefaced by recitals stating at length (R. 46) their reasons and motives for making it (R. 10–12). In summary, these are: the contemplated marriage; the desire of taxpayer to make fair provision for her in "full settlement", "satisfaction", "substitution" and "lieu" of all rights which, upon marriage, she would "otherwise have or become entitled to as wife, widow or otherwise" in the property which he then owned or might thereafter own or in his estate upon his death; and her desire to have such provision made for her as a substitute for all of these rights "to which she may hereafter become entitled, as wife or widow." It is further recited that taxpayer has children by both his previous marriages, and that the parties deem it proper that he be free at all times to make such definite provision for their welfare, by will or otherwise, as he may think best; that without this agreement he would be greatly hindered by dower and other laws from making an equitable distribution of a fair proportion of his estate among his children

and among the children of their contemplated marriage and among other dependents "whom he feels to be justly entitled to receive of his bounty"; that while his net worth then was very substantial, the nature of his business, including stock market operations, subjected him to the risk at any time of heavy losses, and thus the possibility of changing conditions and financial reverses impelled him to guard against any unfortunate consequences which his contemplated marriage and the uncertainties of the future might have upon his will and estate; that the agreement would tend to promote marital tranquility; that Miss Desmare desired to receive the trust settlement provided by the agreement in order to be assured of a means of support for herself and for the children of their contemplated marriage in the event of his death; that he had made full disclosure of his financial situation to her; that she had been advised by her counsel with reference to the import of the agreement; and that both parties were of the opinion that the considerations agreed to be provided by him are the fair and adequate equivalent of the rights agreed to be relinquished and surrendered by her. The agreement was stated to be made in consideration "of the premises and of the solemnization of the aforesaid intended marriage" and of the sum of one dollar paid by taxpayer to her. (R. 12.)

Thereupon, for her part, it was agreed (R. 12):

> The said Kinta Desmare, party of the second part, has granted, remised, released, relinquished, conveyed and forever quit-claimed and by these presents does grant, remise, release, relinquish, convey and forever quit-claim unto the said Charles E. Merrill, party of the first part, his heirs, personal representatives and assigns:
>
> (a) All of the right, title and interest which she may acquire as wife or widow of the first party in all of the lands, tenements and hereditaments of which the first party may be seized at the time of the marriage of the parties or at any time thereafter.
>
> (b) All of the right, title and interest which she may acquire as the wife or widow of the first party in and to any and all personal property, tangible or intangible, which the first party may own at the time of the marriage or at any time thereafter.
>
> This conveyance includes all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowance. Second party hereby waives, discharges and releases every interest, claim or demand of whatsoever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned

by the first party; so that neither the second party nor her heirs, executors, administrators or assigns, or any of them, shall have or be entitled to assert any right, claim or demand whatsoever against any of the properties or estate of the first party but shall be forever barred and excluded therefrom.

* * *

For his part, taxpayer agreed (R. 13):

(a) That within ninety days from the date of said marriage, he will create an irrevocable trust, of $300,000.00 in cash or securities of equivalent value, the provisions of which shall conform to the wishes heretofore expressed by the said Kinta Desmare, that is to say the trust indenture shall provide for the said Kinta Desmare to receive during and throughout her lifetime the net annual income from said trust funds, such income to be paid her quarterly; * * *.

Upon her death, if she is survived by her mother, the income from the trust is to be paid to her mother for life; then upon the death of the survivor, the principal is to be paid to living children of the marriage, in default of these, to living grandchildren of taxpayer, and in default of these, to taxpayer's children by his former marriages (R. 13–14). Two additional trusts to be incorporated in his will were also provided—the first, likewise in the principal amount of $300,000, to contain the same limitations as the *inter vivos*

trust above described; the second, also in the principal sum of $300,000, for the benefit of surviving children by the proposed marriage, and in default of such, to taxpayer's children by his previous marriages (R. 14–15). However, with respect to these two proposed testamentary trusts, it was agreed that if his estate at the time of his death be diminished by losses (other than gifts) to less than $2,000,000, the testamentary trusts shall each be limited to fifteen percent of the value of his net estate (R. 15–16).

Express provision was made that (R. 16):

> Nothing herein contained is intended to deprive the said Kinta Desmare of the right to receive during coverture from the said Charles E. Merrill proper maintenance and support for herself and for any children that may be born to her by him.

It was stipulated that the contract should be construed in accordance with the laws of Florida, and that should the agreement, for any reason, be declared ineffectual to transfer to him the property rights belonging to her which it purported to release, then upon his death, any consideration given to her under the agreement should be deducted from her portion of his estate (R. 16).

Within the ninety-day period specified in this antenuptial agreement, namely, on May 29, 1939, taxpayer created an irrevocable trust to which he transferred $300,000 in cash and in which he named himself as trustee. The limitations of the

trust instrument follow the provisions of the antenuptial agreement. (Ex. B, R. 16–23.) The money was deposited with the Commercial Trust Company of New Jersey to the credit of an account entitled (R. 7):

> Charles E. Merrill, as Trustee under deed of trust dated May 29th, 1939, made by Charles E. Merrill in the amount of $300,000.00.

On the same date, the taxpayer also executed his will containing clauses likewise designed to carry out the provisions of the antenuptial agreement (R. 7). Prior to their execution, the former Miss Desmare's attorney approved these instruments as conforming with the antenuptial agreement (R. 48–49). It was stipulated (R. 7) and found by the District Court that the transactions between taxpayer and Miss Desmare were in good faith (R. 49).

Under the Florida statutes in effect on the date of the marriage (March 8, 1939), the wife had inchoate dower in the land of her husband amounting to a one-third interest in fee simple of such real property as he owned in Florida at marriage or might acquire during marriage, provided she elected in writing within a limited time after his death to apply for it; she also had dower of one-third of his personal property but limited to that owned by him at his death. Should no lineal descendants of them both survive, but other of his lineal decedents survive, her dower was

limited to a child's part (R. 49);[1] this part, it is undisputed, here amounted to one-fourth. On April 21, 1939, between the date of the marriage and the settlement of the trust, the Florida statute was amended to subject dower to the husband's debts at death and to estate taxes, costs, charges, and expenses of administration (R. 72).[2]

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[1] The dower statute of Florida in force and effect at the date of the antenuptial agreement was as follows:

Laws of Florida (1933), c. 16103:

Section 35 [as amended by Acts of 1935, c. 17171, Sec. 1, and Acts of 1937, c. 18066, Sec. 1]. DOWER IN REALTY AND PERSONALTY. Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her said husband, or both, she may elect, in the manner hereinafter provided, to take dower, which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration, provided, however, that if a decedent be survived by his widow, and lineal descendants and that none of such lineal descendants are also the lineal descendants of such widow, then the dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to-wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration; * * *.

[2] Laws of Florida (1939), c. 18999, p. 16.

The parties stipulated (R. 8–9) and the District Court found (R. 9, 50), "if it is possible to place a money value upon the wife's dower interest under the facts in this case" that (R. 49–50):

> The reversionary interest of a person age thirty-five in a fund becoming payable upon the death of a person age fifty-three, per $1.00 of the fund is .422604;

and that this factor was established by calculations based upon the Actuaries or Combined Experience Table of Mortality with interest at 4% (R. 49–50).

In a gift tax return for 1939, taxpayer reported creation of the irrevocable trust and the transfer of $300,000 to it, asserting, however, that no tax was due (R. 24 A). A rider attached to the return contained the following statement (R. 50):

> This trust was created pursuant to an ante-nuptial agreement executed March 7, 1939 between the taxpayer and his wife, wherein, in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property, the taxpayer agreed to create this trust for the benefit of his wife, her mother, and the remaindermen designated by Mrs. Merrill in said agreement. * * *
>
> In view of the net worth of the taxpayer and the value of the real estate and other property owned by him at the time the trust

> was created and the other circumstances set forth in said ante-nuptial agreement, and in view of the absence of any donative intent on the part of the taxpayer, he has excluded the amount of the transfer to this trust from Schedule A of the Gift Tax Return for 1939 on the ground that the relinquishment by Mrs. Merrill of her inchoate dower and other marital rights in his property constituted a valuable consideration in money or money's worth at least equal to the sum of $300,000, the amount transferred to the trust in question.

Miss Desmare also reported the transaction in a gift tax return for 1939 (R. 42A–43).* On a rider attached to her return she stated (R. 43):

> The taxpayer is advised that she became a purchaser of the corpus of this trust for a consideration commensurate with the amount of said corpus, to-wit, $300,000, and that with respect to the provisions in this trust for the benefit of her mother and the other remaindermen designated therein (after her own life) she, rather than her husband (the grantor of said trust), was the donor of such benefits within the terms of the Gift Tax Law.

Neither taxpayer nor Miss Desmare reported income or profit on the described transactions (R. 50–51). The Commissioner, by letter dated August 27, 1941, determined a deficiency of $99,000 in taxpayer's gift tax return for the calendar year

1939 (R. 51). Taxpayer paid the amount assessed with interest, filed claim for refund, and instituted the present suit upon the Commissioner's rejection of the claim (R. 51).

In the District Court the only issues discussed were whether, as a matter of law, the release by Miss Desmare of her marital property rights could constitute "adequate and full consideration in money or money's worth" to any extent, within the meaning of Section 503 of the Revenue Act of 1932, and if so, what, as a question of fact, was the value of these particular rights (R. 52–58).[2] The opinions in the Circuit Court of Appeals (R. 67–77) discussed the questions as to what, if any, consideration in money or money's worth taxpayer received in the transaction; if any, whether he had sustained the burden of establishing a money value for it; and whether the transaction as a whole was to be deemed a gift within the meaning of the statute. The District Court sustained the taxpayer and entered judgment for the amount claimed with interest (R. 57–58). The Circuit

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[2] In its conclusions of law the District Court thus defined the issues (R. 52):

> Under such circumstances, release of wife's statutory rights may constitute full and adequate consideration, in money or money's worth, for a transfer of property to her by the husband, within the true intent and meaning of Section 503 of the Revenue Act of 1932; whether or not it is such full and adequate consideration is a question of fact.

Court of Appeals reversed and directed judgment in favor of the Collector. Judge Waller dissented. (R. 78.)

SUMMARY OF ARGUMENT

1. The circumstance that the transfer was made pursuant to an enforceable contract at common law does not preclude a taxable gift since the gift tax is not confined to transfers of something for nothing. The statute (Section 503, Revenue Act of 1932) provides that a transfer for less than an adequate and full consideration in money or money's worth shall be deemed a gift to the extent of the amount by which the value of the property transferred exceeds the value of the consideration. Treasury Regulations 79, Article 8, long continued and having the force of law, while excepting transactions made in the ordinary course of business (bona fide, at arm's length, and free from any donative intent) as not within the purview of the statute, contemplate that transactions not arising in the ordinary course of business and without consideration adequate and full in money or money's worth, fall within its terms. In any event, in the instant case, no element of a bargain was involved; the context was not commercial; it was a family settlement and there was no purpose to exact a *quid pro quo*. All that transpired was the distribution of a large estate by taxpayer among the members of his family.

as the antenuptial agreement itself establishes, and the essential quality of the transfer is thus the disposition of property by way of gift.

2. Taxpayer received no consideration reducible to a money value for the gift. The release of marital property rights arising after death is not reducible to a money value. The court below in refusing to value them did not abdicate its function nor avoid a problem of valuation because of complexity; on the contrary, the record establishes that the property attempted to be valued does not now exist except as a vague expectation. The property released cannot be known until the taxpayer's death. Ascertainment of the value of this highly contingent interest would require actuarial tools for calculating the probability that taxpayer during his eighteen or nineteen years life expectancy will not give away his estate, will not lose it, will not subject it to debts, and that the legislature will not substantially curtail or destroy the dower rights. Valuation of such an interest would amount merely to speculation bearing the delusive appearance of accuracy. Moreover, this is an action for refund of taxes; the burden of proof is upon the taxpayer not merely to establish that the determination of the Commissioner was erroneous, but to prove affirmatively the correct amount of the judgment to which he claims to be entitled. This burden he has not and cannot sustain, since the consideration for which he

claims credit, in the nature of things, is not reducible to terms of money. Accordingly, the entire value of the property transferred constitutes the amount of the taxable gift.

3. In any event, as a matter of law, the release of dower or statutory marital rights created in lieu of dower, cannot constitute adequate and full consideration in money or money's worth, within the meaning of Section 503 of the Revenue Act of 1932. This construction is confirmed by the history of the estate and gift tax provisions. The estate tax and the gift tax are in *pari materia* and must be construed together. If consideration is afforded a narrower meaning in the gift tax than in the estate tax laws, the main purpose of the gift tax, namely, to prevent or compensate for avoidance of death taxes, will be frustrated. The standard for consideration in both the gift tax and the estate tax was amended by Congress from "fair consideration" to "adequate and full consideration", with the purpose, among others, of foreclosing the view that release of dower can be consideration to any extent under either tax. Section 804 of the Revenue Act of 1932, expressly excluding relinquishment of dower from the meaning of consideration for estate tax purposes, was merely a clarification of existing law; hence the gift tax provisions should also be construed as excluding dower as consideration. Any other interpretation will lead to a perplexing situa-

tion where under identical definitions of consideration in the estate and gift tax, contradictory results are reached. In any event, the failure to amend the gift tax provision is not decisive of the question, for in line with the policy of integration of the estate and gift taxes, Congress designed the gift tax to be construed with reference to and consistently with the estate tax.

ARGUMENT

THE TAXED TRANSFER WAS A GIFT WITHIN THE MEANING OF SECTIONS 501 AND 503 OF THE REVENUE ACT OF 1932 AND THE REGULATIONS

The terms "transfer" and "gift" are used, in Sections 501 and 503 of the Revenue Act of 1932, in their broadest and most comprehensive sense. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27 (1939–1 Cum. Bull. (Part 2) 457, 476); S. Rep. No. 665, 72d Cong., 1st Sess., p. 39 (1939–1 Cum. Bull. (Part 2) 496, 524); cf. *Smith* v. *Shaughnessy*, 318 U. S. 176; *Robinette* v. *Helvering*, 318 U. S. 184. Thus these gift tax provisions are not confined in their application to transfers of something for nothing, for if receipt of consideration by a transferor avoided a gift, as at common law, a ready means would have been afforded for frustration of the tax. Hence, Congress provided not merely that a tax be imposed "upon the transfer * * * of property by gift" (Section 501, Revenue Act of 1932, *infra*,

p. 52), but further enacted, in Section 503 of that Act, that:[4]

> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

The statute plainly contemplates the actuality of a "gift" despite the immediacy of "consideration" of "value"; simultaneously "gift" and "consideration" may coexist; and though the transfer is one "for" the other, nevertheless, "for the purpose of the tax" the excess in value of the property transferred over such consideration is "deemed" a "gift".

Indeed, an analogous problem with respect to deductible claims under the estate tax had previously been dealt with in Section 303 (a) (1)

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[4] A similar but more limited provision was also contained in the Revenue Act of 1924, c. 234, 43 Stat. 253, Section 320, enacting the first gift tax:

> Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

of the Revenue Act of 1926, c. 27, 44 Stat. 9, by use of the same language. There, Congress had provided that claims against an estate were deductible to the extent that they "were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth". This meant, so this Court held in *Taft* v. *Commissioner*, 304 U. S. 351, 355–356, that although claims might be enforceable under state law as contracted for consideration, it did not follow that they were incurred or contracted for an adequate and full consideration in money or money's worth within the meaning of the statute. So here, the circumstance that the transfer was made pursuant to a valid and enforceable contract at common law does not preclude a taxable gift.

Long standing Treasury Regulations correctly mark out this statutory meaning. Thus, Treasury Regulations 79 explain:

> ART. 1. *Imposition of tax.*— * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) * * *
>
> ART. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law

> concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

On familiar principles these Treasury Regulations, long continued without substantial change,[5]

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[5] The language of Article 8 of Treasury Regulations 79, in the 1933 edition, was substantially the same as in the 1936 edition. It then read as follows:

> ART. 8. *Transfers for less than an adequate and full consideration.*—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration constitutes a gift within the meaning of the statute. If the consideration is not reducible to a money value, as in the case of love and affection, promise of marriage, etc., it is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift. A sale, exchange, or other transfer of property (see article 2) in the ordinary course of business, where the transaction is bona fide and at arm's length and free

and applying to an unamended or substantially re-enacted statute, are deemed to have received Congressional approval and have the force of law. *Taft* v. *Commissioner*, 304 U. S. 351, 357; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Douglas* v. *Commissioner*, 322 U. S. 275, 281–282.[6]

The Ninth Circuit Court of Appeals held, in *Commissioner* v. *Greene*, 119 F. 2d 383, 386, certiorari denied, 314 U. S. 641, that "donative intention is immaterial, because § 503 of the act in question does not require it." It is unnecessary, however, for this Court to decide whether or not a donative intent is completely immaterial in all

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from any donative intent, shall be considered as made for an adequate and full consideration in money or money's worth.

In Treasury Regulations 108, Section 86.8, interpreting the same statutory language now found in the Internal Revenue Code, Section 1002, the language of the 1936 edition of Treasury Regulations 79, Article 8, is continued without change.

[6] The reports of the Congressional Committees, recommending adoption of the statute, read as follows (H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2) 457, 477–478); S. Rep. No. 665, 72d Cong., 1st Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 496, 525)):

> Since the tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000.

situations. The Treasury, by the authoritative construction contained in its Regulations already quoted, has excluded "bad bargains" made in the ordinary course of business (Article 8, Treasury Regulations 79):

> However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth.

In any event, when a transaction is essentially a family settlement and involves no bargain or *quid pro quo*, the statute and regulations assume a gift and do not require express proof of donative intent. Certainly the regulations do not broaden the statute, if anything they limit it.[1] Indeed, this Court in *Robinette* v. *Helvering*, 318 U. S. 184, 187–188, recently has construed, applied, and by implication approved Article 8, in holding that a family settlement fell without "the permissive scope of Art. 8 of Regulations 79 (1936 edition)", since it did not constitute a transaction "in the ordinary course of business".

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[1] Thus, in II Paul, *Federal Estate and Gift Taxation*, Sec. 16.14, p. 1113, it is stated:

> It is assumed in the regulations that if a transfer is not "made in the ordinary course of business," as defined by the Treasury, the lack of "an adequate and full consideration in money or money's worth" should dispose

The instant case surely involves no arm's length transaction in the ordinary course of business. The context was not commercial at all; it was a family transaction. It involved neither a good nor a bad bargain; it involved no bargain at all. There was no purpose to exact a *quid pro quo;* taxpayer wished to afford his prospective wife and her children assurance of support in the event of his death. This is the typical situation in which the gift tax—bulwark of the estate tax—was meant to apply. Taxpayer desired and Miss Desmare desired for him, unhampered control of his affairs (R. 11) so that he might arrange them readily by equitable division for the benefit of the entire family including his children by former marriages and his grandchildren.[8] Clearly the promise and transfers on one side were not in *payment* for those on the other. With marriage in mind taxpayer consulted his lawyer (R. 44)—

> as to the feasibility of making a prenuptial agreement with Miss Desmare to settle property rights, safeguard against an unequal distribution of his estate and avoid

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of any assertion that the transferor lacked donative intent.

For further discussion of the meaning of the statute and regulations in this connection, see II Paul, *id.* at Sections 16.14–16.15.

[8] The antenuptial agreement was executed in the presence of his married daughter by a former marriage, Doris Merrill Magowan, and probably also his son-in-law (R. 15, 16).

> for all time any possible repetition of such a contest over money matters as he had experienced in connection with the above mentioned divorce proceeding.[9]

Thus taxpayer did not seek a trade with his prospective wife; he was interested in a family settlement and a fair distribution of his estate. The antenuptial agreement is replete with indicia of this purpose and no other. Made the day prior to the marriage (R. 7), it recites the contemplated marriage; the desire of taxpayer to make fair provision for Miss Desmare; her wish to have such provision made for her as a substitute for all rights "to which she may hereafter become entitled, as wife or widow" (R. 10) in his property; that it is proper that he be free to make provision for his children by the former marriages, and that in the absence of agreement he would be hindered by existing dower and other laws "from making equitable distribution" (R. 11) of his property among his children and their children and others "justly" objects of his "bounty"; that the nature of his business, "stock market operations" (R. 11), involves risk of heavy losses and that he wishes to guard against

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[9] Since the antenuptial agreement does not waive Miss Desmare's right to support (R. 16), it is difficult to see how that agreement could serve in the unhappy event of future marital misunderstanding to "avoid for all time any possible * * * contest over money matters". This is significant as an indication that taxpayer's primary aim was to make provision for his wife after his death (see *infra*, pp. 26–27).

any unfortunate consequences which his contemplated marriage and the uncertainties of the future may have upon his will and estate; that the agreement will promote marital tranquillity; and that she (R. 11)—

> desires to presently receive the trust settlement hereinafter mentioned and to be assured of a means of support for herself, should she become the first party's widow, and of some provision for any issue of her contemplated marriage; that she is accordingly desirous of having her property rights as wife and widow fixed at this time or made as certain as is now reasonably possible and has urged the first party to make for her and any child or children of hers the provision hereinafter set forth; * * *.

Moreover, the "solemnization" of the "intended marriage" (R. 12) was expressly stated as consideration for the transfer by taxpayer. In his gift tax return, taxpayer stated that the antenuptial agreement was executed (R. 50)—

> in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property * * *.

But taxpayer no more bargained or traded for Miss Desmare's release of her marital rights than for her agreement to marry him.

The transfer was designed to accomplish a division, within the family unit, of a large estate.

It is significant that the taxpayer himself served as trustee under the *inter vivos* trust, as actually set up after the marriage (R. 17, 22). And the participation of the wife's personal attorney in the process of agreement to the contract and the trust instrument does not cast doubt on the characterization of this transfer as a gift. Such participation is not unusual in transactions involving large property interests since close familiarity of counsel with the problems of each party is often desirable. In *Commissioner* v. *Bristol,* 121 F. 2d 129, 131 (C. C. A. 1st), though the court characterized a similar transfer as a "purely business transaction" since it involved the disposition of large interests in property, the transfer was nevertheless held to be a taxable gift.

Finally, it is to the future principally that the antenuptial agreement looks and to the settlement of taxpayer's estate after death. The agreement plainly provides that it is not intended that the future Mrs. Merrill or her children be deprived of taxpayer's support during coverture (R. 16). The *inter vivos* trust, as well as those created under his will, were expressly set up as "a means of support for herself, should she become" his "widow" (R. 11); the agreement thus concerns principally her support and the support of their children after his death. As the court below said, therefore (R. 72):

> We repeat our conviction that the true view of this transaction is that in consid-

> eration of marriage Merrill made, wisely and rightly, a certain and present provision for his wife in substitution for the uncertain and contingent one given her after his death, at her election, by law. The latter would have been taxable. So is that which was substituted for it.

Situations like those involved in *Lasker* v. *Commissioner,* 138 F. 2d 989 (C. C. A. 7th), and *Jones* v. *Commissioner,* 1 T. C. 1207, are readily distinguishable. There, a husband and wife were taking steps to secure a divorce and the settlement of the wife's right to support and her property claims against him were at issue. While we think that the Regulations were not intended to exclude even that type of transaction, there, the parties were dealing at arm's length, in a sense, and the purpose to trade may have been said to exist. Thus, in the *Jones* case, the Tax Court expressly differentiated antenuptial agreements, such as that here involved, and said (p. 1210):

> There may be some ground for argument that prior to or during marriage, when no divorce is contemplated, the inchoate right of dower which may never be realized is too uncertain and indefinite to be then measured in terms of money. Moreover in those cases the circumstances are frequently such that there may well be a definite donative intent in the transfer. The contract there may be to effect a mere family arrangement. The parties are man-

> ifestly not dealing at arm's length and the purpose to exact a *quid pro quo* may be lacking.

Indeed, in the *Lasker* case, it appears (p. 991) that the court understood that the Commissioner conceded that the transaction in question was made in the ordinary course of business at arm's length within the exception contained in Article 8 of Regulations 79.[10]

Again, *Wemyss* v. *Commissioner* 144 F. 2d 78, No. 629, this Term, recently decided by the Sixth Circuit Court of Appeals and which is to be argued immediately after this case, was expressly differentiated by that court from a case like the one at bar. The court there said (p. 81):

> This case differentiates from those cases in which prospective husbands and wives have entered into prenuptial agreements as to the interest to be acquired by the lady in the property and estate of the gentleman. In these cases the prospective wife was agreeing to surrender only herself to the bonds of matrimony without an accompanying surrender of any property owned by her. She was providing against the exigencies of matrimony by fixing a definite basis for her participation in the property or estate of the man she was about to marry. For example, see *Commissioner of*

[10] As a matter of fact, the Government did not intend such a concession.

> *Internal Revenue* v. *Bristol,* 1 Cir., 121 F. 2d 129.

By contrast, the facts in this case, as already pointed out, are closely analogous to those involved in *Robinette* v. *Helvering,* 318 U. S. 184, where by agreement mother and daughter executed reciprocal trusts and the stepfather made a similar arrangement by will. There taxpayer's contention that this agreement came within the exception of the regulations, as an arm's length transaction in the ordinary course of business, was overruled by this Court.

II

TAXPAYER RECEIVED NO CONSIDERATION REDUCIBLE TO A MONEY VALUE AND ACCORDINGLY THE ENTIRE VALUE OF THE PROPERTY WHICH HE TRANSFERRED IS TAXABLE

Where a transferor receives from a transferee consideration of value for a gift, as has been seen, the statute limits the gift to the difference in value between that given and that received. Section 503, Appendix, *infra,* p. 52. The purpose of this provision and of similar wording in sections of the estate tax law is stated by the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Bristol,* 121 F. 2d 129, 134—

> to prevent the depletion of the transferor's or decedent's estate, unless a tax was paid on the transfer, by requiring that the trans-

> feror or decedent receive in exchange something of the same money value.

"Consideration", as used in Section 503, the court in the cited case states (p. 133)—

> means that when the transferor gives something away and does not at the same time replace it with money of equal value or some goods or services capable of being evaluated in money, he is deemed to have made a gift within the taxing law.

Thus, the Regulations provide that where "a consideration" is "not reducible to a money value" it is "to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift." (Article 8, Appendix, *infra*, p. 54.) Hence, the question arises as to what, if any, consideration reducible to a money value taxpayer received in this transaction. Taxpayer apparently concedes, as he must, that the marriage or the promise thereof did not constitute a consideration reducible to a money value. *Commissioner* v. *Bristol, supra;* Regulations 79, Article 8, Appendix, *infra*, p. 54. The court below, indeed, ruled that this was the only consideration for the taxed transfer, and argued that Miss Desmare offered "herself in marriage, and herself alone" (R. 70); it pointed out that the law of Florida would have given her after marriage, if she survived taxpayer, the right to elect dower in her husband's lands and in his personal estate owned at his death; that by the antenuptial agree-

ment the parties arranged that the marital rights, created not by their convention but by the law, should not come into existence, but another more definite provision be substituted. The court concluded that (R. 70–71):

> For this substituted provision she pays just what she would have paid for the provision made by law—herself in marriage. Merrill receives that and nothing else. It is what moves him to make a provision for her. When the transaction is consummated he has a wife and $300,000 less money. She has the $300,000 (with more to follow) and has given herself.

His estate received nothing to compensate for the depletion caused by the transfer of $300,000. All that happened was that a definite basis for the wife's interest in her husband's estate was fixed.

In any event, the only consideration which taxpayer claims he received, namely, release of her inchoate right to elect dower of one-fourth in his lands owned during coverture and in his personal estate owned at his death,[11] is not reducible to a money value. At the time of his marriage, taxpayer owned personal property in the approximate amount of $5,300,000. In addition, he owned real estate, all in Florida, in the amount of $135,000. (R. 49.) The district court found one-fourth of the taxpayer's net worth of $5,300,000 to be $1,325,000; then deducting the sum of $300,000

[11] Notes 1 and 2 and 10, *supra*, state the Florida law.

agreed to be provided for the wife in the testamentary trust, there remained $1,025,000, which the district court held (R. 57)—

> properly may be said to reflect the amount of the contingent interest which was compromised for cash. By using the actuarial factor .422604 and reducing $1,025,000.00 to present worth, the figure of $433,169.10 is obtained and in my opinion may be fairly said to represent the consideration, in money or money's worth, flowing to Mr. Merrill in exchange for the $300,000.00 transferred by him to the irrevocable trust.

The "actuarial factor" was based upon a mortality table with interest at 4%, and represented merely the present net worth of a reversion belonging to a person thirty-five years of age in a fund payable upon the death of a person fifty-three years of age (R. 49–50).[12] This computation

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[12] While reference is made in taxpayer's brief (pp. 17, 27) to the stipulation, already noted, that "this formula and computation is correct, if it is possible to place a money value upon the wife's dower interest under the facts in this case" (*supra*, p. 11), and taxpayer seems to claim that this constitutes an agreement with the Government for "an appropriate valuation formula" (Br. 27) which barred consideration by the court below of the measurement problem, taxpayer's petition for certiorari (p. 4) states that a subsidiary question in the case is

> Whether the marital rights here released were susceptible of appraisal or valuation and were shown to have equaled in value the sum transferred by the husband to the trust.

Moreover, it is quite clear that the stipulation merely amounted to an agreement that the formula was a correct

is founded upon the completely false assumption that the wife's elective interest in taxpayer's estate is contingent only upon her surviving him. The fact is that these marital rights are also subject to numerous other contingencies which the formula used completely disregards. The dower in the personal property applies only to that owned by the husband at the time of his death. Taxpayer's life expectancy was eighteen or nineteen years (R. 71); except for the power of testamentary disposition (R. 72), he had complete dominion over his personalty as long as he lived. Without his wife's consent or contrary to her wishes, he could waste it or give it away, subject to no control whatever and guided solely, if he chose, by mere caprice (R. 71–72). *Smith v. Hines*, 10 Fla. 258.[13]

Moreover, taxpayer might lose his property, and he and his wife expressly recognized the risk of serious financial reverses as being real and in-

means of calculating the value of the wife's reversionary interest if only the calculable contingency—her life expectancy—is taken into consideration. In no sense was the stipulation an agreement that the marital rights were reducible to a money value: i. e., that "it is possible to place a money value upon the wife's dower interest." Indeed this was one of the principal issues considered by both courts below as appears from their opinions (R. 55–57, 71–72).

[13] The dower in the personalty was also conditioned upon taxpayer's retention of his Florida domicile; but the possibility of change has actually materialized and taxpayer is now a resident of New York, not Florida (R. 72).

herent in the nature of his business. As they state in the antenuptial agreement (R. 11)—

> while the personal net worth of the first party now amounts to a very substantial sum, the very nature of his business (investment banking and stock market operations) continuously involves him in contingent risks which may at any time entail heavy losses.

At the time of his marriage taxpayer's real property amounted to $135,000 in value, no more than approximately 27 percent of his estate; there is no evidence that he intended to buy more land and no basis for computation as to any other (R. 71). Applying the formula for which taxpayer contends,[14] the present value of the inchoate dower in the realty is not more than $15,000.[15] Besides, under the amendment to the Florida statute adopted on April 21, 1939,[16] between the marriage date and the settlement of the trust, land as well as personalty is subject to the taxes, debts, and administrative expenses of the husband's estate at the time of his death (R. 72). Similarly, the marital rights both in personalty and realty are subject to additional curtailment by legislation, creating a further contingency. *Randall* v. *Kreiger*, 23 Wall. 137; *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U. S. 314.

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[14] $135,000 divided by 4 is $33,750 × .422604 equals $14,262.88.

[15] Laws of Florida (1939), c. 18929, p. 16.

Yet for none of these possibilities does taxpayer make allowance; and indeed by reason of their inherent nature none are capable of actuarial measurement. A similar formula was held fallacious, as applied to valuation of marital rights in personalty under the identical statute, by the First Circuit Court of Appeals in *Commissioner* v. *Bristol*, 121 F. 2d 129, 134. Such rights during the husband's lifetime, the court ruled, are not property at all but a mere expectancy, quite incapable of valuation. In parallel situations this has long been the law applied by the federal courts. In *Robinette* v. *Helvering*, 318 U. S. 184, taxpayer sought to deduct from the total value of a gift the value of his reversionary interest. This Court contrasted the facts in the *Robinette* case with those in *Smith* v. *Shaughnessy*, 318 U. S. 176, decided at the same time, where the reversionary interest depended only upon taxpayer surviving his wife and where, as the Government conceded, the value was capable of ascertainment by recognized actuarial methods. In the *Robinette* case, however, the reversionary interest was conditioned not only upon survivorship, but also upon the death of the life tenant without issue who should reach the age of twenty-one years. In language apposite to the instant case, this Court said (pp. 188–189):

> Factors to be considered in fixing the value of this contingent reservation as of the date of the gift would have included con-

> sideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. *Humes* v. *United States*, 276 U. S. 487, 494.

To attempt calculation of the wife's contingent interest in her husband's realty and personalty would, as in *Humes* v. *United States*, 276 U. S. 487, 494, be "mere speculation bearing the delusive appearance of accuracy". In *Commissioner* v. *Marshall*, 125 F. 2d 943 (C. C. A. 2d), Judge Frank, speaking for the court, pointed out the distinction between a case, where the only contingency is survivorship, measurable by recognized mortality tables based upon experience of many lives, and a case such as that at bar, where an additional incalculable contingency—human volition, among others,—is involved. He observed that where the donor has reserved the power of altering trusts (pp. 946–947)—

> so that the actual enjoyment or non-enjoyment of the remainders depended on the donor's decision; in such a case there would be no feasible measure of the "value" of the remainders, for there are no tables or other means for even roughly measuring the whims or fancies of such a donor.

Here the bulk of the property subject to the marital rights is completely dependent upon taxpayer's wishes or whims during his lifetime; its actual value cannot be calculated. The real estate is a more stable factor but nevertheless incalculable since it may be consumed by the husband's debts outstanding at his death.

Where decedent's will permitted invasion of the corpus of the trust for the comfort and happiness of his widow, a life beneficiary, and enjoined the trustee to be liberal in the matter, this Court in *Merchants National Bank* v. *Commissioner*, 320 U. S. 256, has recently held that the value of remainders left for charitable uses could not be computed, since the purposes for which the widow might wish to have the funds spent did not lend themselves to reliable prediction. *A fortiori* is that true here, where no mere right of invasion of the corpus of a trust is involved, but complete dominion by taxpayer except as to his power of testamentary disposition. To the same effect as the *Merchants National Bank* case are *Gammons* v. *Hassett*, 121 F. 2d 229 (C. C. A. 1st), certiorari denied, 314 U. S. 673; *Helvering* v. *Blair*, 121 F. 2d 945 (C. C. A. 2d); *United States* v. *Frank*, 133 F. 2d 1009 (C. C. A. 7th); *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 (C. C. A. 8th).

In the instant case, as in those cases, the court has not shirked its duty, nor avoided a problem of valuation because of complexity. The

difficulty here is that taxpayer has not proved the nature and extent of the property which he seeks to have valued; on the contrary, he cannot prove its value; the future, now unpredictable, must define it. In order to calculate the value of such an interest, we must have some actuarial basis for the probability that taxpayer during his life expectancy of eighteen or nineteen years, will not give away his estate, will not lose it, will not subject it to debts, and that the legislature will not substantially curtail or destroy the dower rights. Obviously nothing of this kind is in the record in this case, nor, in the nature of things, can it be compiled. Compare *Helvering* v. *Blair*, *supra*, pp. 947–948.

The intangible benefits which, the dissenting opinion suggests, "flowed to him rather than his estate" (R. 76) cannot constitute money consideration. These are said to include (R. 77):

> (a) the right to transact his business without any veto power on the part of his wife; (b) lessening of the possibility of friction between him, his wife, and her stepchildren; (c) and by this financial arrangement eliminating the most frequent menace to conjugal and family congeniality.

Items (b) and (c) are no more reducible to money value than are considerations of marriage or love and affection—though these also often promise economic advantage. Indeed, the antenuptial agreement did not insure against the third wife demanding alimony as had the second, for

her right and the right of her children to claim support were not released (R. 16). As to item (a), his business involved securities[16]—personalty; the antenuptial agreement did not add to his freedom in the conduct of that business.

Finally, this is an action to recover a refund of taxes; taxpayer must establish not merely that the determination of the Commissioner was erroneous, but must prove affirmatively the correct amount of the judgment to which he claims to be entitled. *Helvering* v. *Taylor*, 293 U. S. 507, 514; *Forbes* v. *Hassett*, 124 F. 2d 925, 928 (C. C. A. 1st). This burden he has not and cannot sustain, since the consideration for which he claims credit, in the nature of things, is not reducible to money terms. The consideration received must be wholly disregarded and the entire value of the property transferred assessed as a taxable gift.

III

RELEASE OF DOWER OR STATUTORY MARITAL RIGHTS CREATED IN LIEU OF DOWER CANNOT, AS A MATTER OF LAW, CONSTITUTE "ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH" TO ANY EXTENT, WITHIN THE MEANING OF SECTION 503 OF THE REVENUE ACT OF 1932

The concept of "consideration" contained in the gift tax provisions is the result of a process of

[16] As already stated, the principal part of his real estate was used as a residence (R. 7), and his real property ownings as a whole constituted less than 3/100 of his estate.

development which can be traced back at least as far as the earliest modern federal estate tax. However, at all times, the design appears plain: to exclude from its import release of dower or similar marital property rights coming into enjoyment after death. We contend moreover, that Congress intended "adequate and full consideration" to have the identical significance in the estate and gift taxes at all times. In a case presenting essentially the same situation as that which is here involved, the Circuit Court of Appeals for the First Circuit has so held (*Commissioner* v. *Bristol*, 121 F. 2d 129, 134–136), and in language often quoted, this Court has said (*Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 44):

> The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet* v. *Guggenheim*, supra, 286. An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.

If "consideration" is afforded a narrower meaning in the gift tax than in the estate tax, this design is frustrated and ready opportunity is afforded for avoidance of the estate tax.

From the inception of federal estate taxation Congress has been concerned with *inter vivos* transfers which might have the effect of avoiding

the tax, and in the first modern estate tax law provided for inclusion in the gross estate of the decedent transfers in contemplation of or intended to take effect in possession or enjoyment at death, excepting, however, in language here significant, "a bona fide sale for a fair consideration in money or money's worth". Sec. 202 (b), Revenue Act of 1916, c. 463, 39 Stat. 756.

Again, from the inception of this tax, Congress regarded dower and similar marital property rights in the same category as other property of the decedent. Dower rights were treated as mere expectations and not the property of the spouse during the lifetime of the husband, and Congress intended that such interests should be included in the gross estate of the decedent. The insertion of an express provision to that effect, in Section 402 (b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, was understood to be declaratory of the existing law.[17] The Ways and Means Committee stated that the distinction between dower and property passing to the wife by will or intestate succession is technical rather than real, at least so far as inclusion for purposes of the estate tax is concerned, and that the Treasury Department had been correct in ruling that it

[17] Sec. 402 (b) provided as follows:

To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy:

should be included in the gross estate under the 1916 Act.[7] The language of the amendment has remained unchanged in all subsequent Acts.

It was not until the Revenue Act of 1924 that Congress limited deductible claims to those supported by consideration. The same standard was used as had been applied to transfers in contemplation of death, namely, "claims contracted bona fide and for a fair consideration in money or money's worth" (Section 303 (a) (1) of the Revenue Act of 1924, c. 234, 43 Stat. 253) for, as the Committee Reports state, "On principle the same limitation should be applied here, and

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[7] H. Rep. No. 767, 65th Cong., 2d Sess., p. 21 (1939-1 Cum. Bull. (Part 2) 86, 101):

> Section 402 of this bill, which takes the places of section 202 of the original act, has been revised so as to contain a provision specifically including in the gross estate dower, curtesy, or any estate created in lieu of dower or curtesy. The distinction between dower and curtesy interest and property passing to wife or husband by will or intestate succession is technical rather than real, at least in the consideration of the question as to whether they should be subject to estate tax. The proposed amendment is for the purpose of making it clear that such interests are to be included.
>
> It was the intention of the framers of the original act that dower, curtesy, and estates created in lieu of dower or curtesy should be included in the gross estate, and your committee believes that the Treasury Department has correctly ruled in requiring them to be so included. Since a dispute has arisen with reference to this question, your committee deems it advisable to provide specifically that these estates shall be included in the gross estate.

the proposed amendment is designed to effect this result."[19] Subsequent sections of the same statute enacted the first gift tax, and with manifest logic, for the peril to be avoided with respect to each tax and the problems to be solved were identical, repeated the precise language evolved in the development of the estate tax.[20]

In the Revenue Act of 1926, this language underwent significant alteration. Prior thereto, the Third Circuit Court of Appeals had decided in *Ferguson* v. *Dickson*, 300 Fed. 961, certiorari denied, 266 U. S. 628, construing the Revenue Act of 1918, that a transfer by a husband to a wife, pursuant to an antenuptial agreement wherein she had released her dower rights, was a sale for "a fair consideration", and accordingly did not constitute a transfer in contemplation of death. In so holding, the court distinguished (p. 964) between "fair" consideration on the one hand and "adequate" or "full" consideration on the

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[19] H. Rep. No. 179, 68th Cong., 1st Sess., pp. 28, 66 (1939–1 Cum. Bull. (Part 2) 241, 261; S. Rep. No. 398, 68th Cong., 1st Sess., p. 35 (1939–1 Cum. Bull. (Part 2) 266, 290).

[20] Revenue Act of 1924, Sec. 320:

* * * * *

Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

other,[21] pointing out that the Act of 1864 had used the term "adequate consideration." Precisely the same approach was taken by this Court in *Taft* v. *Commissioner*, 304 U. S. 351, 356. It was there pointed out, with reference to the *Dickson* case that:

> The Act of 1924 altered existing law and authorized the deduction of claims against an estate only to the extent that they were "incurred or contracted bona fide and for a fair consideration in money or money's worth." Congress had reason to think that the phrase "fair consideration" would be held to comprehend an instance of a promise which was honest, reasonable, and free from suspicion whether or not the consideration for it was, strictly speaking, adequate. The words "adequate and full consideration" were substituted by § 303 (a) (1) of the Act of 1926. There must have been some reason for these successive changes. It seems evident that the purpose was to narrow the class of deductible claims, and we are not at liberty to ignore this purpose.

In the Revenue Act of 1926, this language—"for an adequate and full consideration in money or money's worth"—was substituted throughout the

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[21] In accord with this holding are *McCaughn* v. *Carver*, 19 F. 2d 126 (C. C. A. 3d); and *Stubblefield* v. *United States*, 6 F. Supp. 440 (C. Cls.), construing the words "fair consideration" contained in the earlier Acts.

various provisions of the estate tax in place of the former "for a fair consideration in money or money's worth".[22]

While the Revenue Act of 1926 did not reenact a gift tax, the Revenue Act of 1932 enacted the gift tax provisions here under construction. Section 503 of this statute repeated the language contained in the estate tax provisions of the Revenue Act of 1926 and included as gifts transfers made for less than "an adequate and full consideration in money or money's worth". The new gift tax was integrated with the existing and additional estate tax (Section 401 of the Revenue Act of 1932) by allowing credits against the estate tax with respect to gift taxes paid.[23] Title VI, entitled "Estate Tax Amendments", contains the following provision:

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[22] E. g., Sec. 302 (c), (d), (e), (f) and (i); Sec. 303 (a) (1); Sec. 315 (b). Sec. 302 (i), which was new in this Act, is significant as reflecting language later incorporated in Sec. 503 of the Revenue Act of 1932, and reads as follows:

> (i) If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subdivisions (c), (d), and (f) of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

[23] Secs. 402, 801, Revenue Act of 1932.

SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration in money or money's worth'."

This language, it will be noted, closely parallels the provision already quoted, long before incorporated in Section 402 (b) of the Revenue Act of 1918, and continued in the successive Revenue Acts (See Section 302 (b) of the Revenue Act of 1926) expressly including such marital property rights in a decedent's gross estate, *supra*, p. 41. Indeed, Section 804 was enacted as a bolster against "subversion" of the legislative intent, which had already been expressed in those sections including dower in the gross estate, and, like that earlier amendment, is to be regarded as declaratory of existing law.[24] The Fourth Circuit

[24] H. Rep. No. 708, 72d Cong., 1st Sess., p. 47 (1939-1 Cum. Bull. (Part 2) 491); S. Rep. No. 665, 72d Cong., 1st Sess., p. 50 (1939-1 Cum. Bull. (Part 2) 532):

SECTION 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION. This amendment excludes, in determining "consideration in money or money's worth", the value of a relinquished, or a promised relinquishment of,

Court of Appeals so held in *Empire Trust Co.* v. *Commissioner*, 94 F. 2d 307, 309–310. Accord: *Sheets* v. *Commissioner*, 95 F. 2d 727, 730 (C. C. A. 8th).

Thus, without the amendment contained in Section 804, the words "adequate and full consideration" contained in Section 503 of the Revenue Act of 1932, here under construction, must be regarded as designed in the case of the gift tax, as they were in the case of the estate tax, to exclude release of dower.[25] The change from the wording

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dower, curtesy, or other marital rights in decedent's property. Section 302 (a) and (b) of the 1926 Act require the value of such an interest to be included in the gross estate, and, if its value may, in whole or in part, constitute a consideration for an otherwise taxable transfer (as has been held to be so), or an otherwise unallowable deduction from the gross estate, the effect produced amounts to a subversion of the legislative intent expressed in section 302 (a) and (b).

For example, a decedent dies leaving an estate of $1,500,000 (after payment of all charges), and under the State law the surviving spouse is entitled to one-third, or $500,000, of which she can not be deprived by will without her consent. Under existing law, the estate is entitled to no deduction on account of her statutory rights, but, if she and decedent had entered into a contract by which she was to receive from his estate a stated sum in consideration of a waiver of her statutory rights, the amount due her under the contract might be held a deductible claim against the estate as having been contracted for an adequate and full consideration in money's worth, namely, the value of her waived marital rights.

[25] Release of inchoate dower may well be understood as one of the considerations not reducible to money value included in the following sentence of Regulations 79, Article 8:

of the 1924 Act is sufficient to avoid the construction of "fair" consideration in *Ferguson* v. *Dickson, supra*. As the court said in the *Bristol* case, referring to *Empire Trust Co.* v. *Commissioner, supra* (p. 135):

> The only case in point, therefore, holds that under the estate tax provisions of the Revenue Act of 1926 release of dower cannot be regarded as "adequate and full consideration in money or money's worth"; in fact, cannot be regarded as consideration at all, for the court allowed no deduction from the gross estate. The phraseology of the

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A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Indeed, the section of the Oregon Gift Tax Act (Laws of Oregon (1933), c. 427, Sec. 3, p. 730) identical with Section 503 of the Revenue Act of 1932, is so expressly construed in the regulations and instructions issued by the Oregon taxing authorities. The form of the Oregon Regulation is substantially the same as Treasury Regulations 79, Article 8 (1934 edition, quoted in footnote 5, *supra*, p. 20), with this interesting addition which so far as pertinent, reads:

Oregon Regulations and Instructions to Gift Tax Act [3 C. C. H., State, Inheritance, Estate and Gift Tax Service, 7th ed., p. 49,234].

> ART. 7. *Gross Gifts Made During Calendar Year for Which This Return Is Filed; Schedule B.*—
>
> (i) * * * If the consideration is not reducible to a money value as in the case of love and affection, promise of marriage, *release of inchoate right of dower*, etc., it is to be wholly disregarded and the entire value of the property transferred constitutes the amount of the gift. * * * (Italics supplied.)

gift tax, enacted in 1932, is precisely the same, and it therefore seems a fair assumption that the consideration requisite under the two taxes is identical. Since release of dower does not meet the requirements of the estate tax, it does not meet the standards required by the identical words of the gift tax.

Moreover, another important purpose of the gift tax has been to supplement the income tax by discouraging the division of large estates among members of a family, thereby avoiding surtaxes.[28] If release of inchoate dower is regarded as consideration within the meaning of the gift tax, the usefulness of the gift tax for this purpose will be seriously curtailed under the very circumstances in which the division of estates to avoid surtaxes is most likely and practical.

In any event, even if taxpayer is correct in contending that the 1932 amendment to the estate tax resulted in an actual change in the treatment of dower as consideration for estate tax purposes, the allegedly new construction should be applied to the gift tax. To adopt the language of the court in the *Bristol* case (p. 136):

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[28] *Smith* v. *Shaughnessy*, 318 U. S. 176, 179, note 1; *Commissioner* v. *Bristol*, 121 F. 2d 129, 136; H. Rep. No. 708, 72d Cong., 1st Sess., p. 28 (1939–1 Cum. Bull. (Part 2) 477); S. Rep. No. 665, 72d Cong., 1st Sess., p. 40 (1939–1 Cum. Bull. (Part 2) 525). Gifts under a marriage settlement are excluded from taxable income. Revenue Act of 1938, Sec. 22 (b) (3), and Treasury Regulations 101, Art. 22 (b) (3)–1, Appendix, *infra*, pp. 53, 54.

> Why Congress did not apply § 804 to the gift tax we do not know. It may have been inadvertence; it may have been that Congress felt that correction of the erroneous interpretation of the words in the estate tax would forestall similar erroneous construction of the same words in the newly enacted gift tax. Whatever may have been the reason, we believe that as an original matter, the phrase as used in the gift tax was intended to have a construction similar to that given by § 804; and we do not feel that the mere absence of such an express limitation should prevent that interpretation. The provisions of the revenue act imposing the gift tax have always been interpreted by the courts by reference to the complementary estate tax.

The estate tax, like the gift tax, applies to some completed *inter vivos* transfers. These may be transfers in contemplation of death or those intended to take effect in possession or enjoyment at or after death. Congress could hardly have intended that completed *inter vivos* transfers, some of which would be subject to the estate tax, were not to be taxed as gifts, or that different treatment should be accorded to *inter vivos* transfers which do not fall within the estate tax but are like transfers so taxed. Such an interpretation would lead to a perplexing situation where under identical definitions of consideration in the estate and gift tax contradictory results are reached.

The 1932 estate tax amendment was merely declaratory of the existing law and, in any event, the absence of this amendment from the gift tax provisions is not decisive of the question. In accordance with the policy of integration of the estate and gift taxes, Congress designed the gift tax to be construed with reference to and consistently with the estate tax. While the correlation may not be complete in the sense that Congress may have intended to subject certain transfers to both the gift and estate tax, since the gift tax is a "form of down-payment on the estate tax" (*Smith* v. *Shaughnessy*, 318 U. S. 176, 179), there is no warrant for saying that "consideration" is to be given a different meaning in the gift tax provisions than it has under the estate tax.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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JANUARY 1945.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *.

* * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

* * * * *

SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of

dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth'."

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance * * *.

* * * * *

Treasury Regulations 79 (1936 ed.):

Article 1. *Imposition of tax.*—* * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) * * *

Art. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given

therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

> Art. 22 (b) (3)–1. *Gifts and bequests.* * * * An amount of principal paid under a marriage settlement is a gift. * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 126

CHARLES E. MERRILL,

Petitioner,

vs.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

SAM R. MARKS,
Counsel for Petitioner.

FRANCIS M. HOLT,
HARRY T. GRAY,
Of Counsel.

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PETITION FOR REHEARING

Charles E. Merrill, the petitioner herein, respectfully requests a rehearing of this case and in that behalf shows:

That in its progress through the district and appellate courts, thirteen Federal judges have given consideration to this case. Six of the judges have thought petitioner was required to make an unauthorized tax payment while seven have been of contrary view. In this Court the division was four to five.

In the Bristol case,[1] of like character, where the same point was involved, sixteen members of the Board of Tax Appeals unanimously held such a tax illegal and unwarranted; on appeal,[2] three judges of the Circuit of Appeals

[1] *Bristol v. Commissioner*, 42 B. T. A. 263.

[2] *Commissioner v. Bristol*, 121 F. 2d [illegible].

were contrary minded but the Tax Court, still unconvinced, reaffirmed its stand in the Jones case,[3] saying:

> "We have not, however, departed from the view expressed in our opinion in that (Bristol) case."

Indeed, the theory of the First Circuit Court of Appeals in the *Bristol* case, until its acceptance by the majority opinion in the instant case, has been rejected whenever advanced to Federal judges as an authoritative interpretation of Congressional intent.[4]

With such a divergence of opinion, it is not surprising that the taxpayer ponders and his counsel wonders if he has been remiss in the preparation of his brief or lacks the power of convincing argument.

The point of law is clear cut. It involves merely a question of statutory construction. This Court is learned in the law. We are not dealing with the mystical as was the poet when he said:

> "Myself when young did eagerly frequent
> Doctor and Saint, and heard great argument
> About it and about: but evermore
> Came out by the same door wherein I went."

And so we ask further consideration of the case to the end that some more harmonious conclusion may be reached. We realize this is the last round, that this Court speaks the final word; all the more reason why it is necessary to make and file this petition. Our grounds are these:

First: That this Court's opinion would deny to petitioner all benefit of the viewpoint of the Tax Court on the question here involved, merely because this case came up through the District rather than the Tax Court; and

[3] *Jones v. Commissioner*, 1 T. C. 1207.

[4] Petitioner's brief, page 16, and cases there cited.

this although the District Court's opinion clearly shows[1] that its holding in favor of petitioner was in accord with, in fact based largely upon, the viewpoint of the Tax Court as expressed in the *Bristol* case, 42 B. T. A. 263. There the issues of fact and law were for all practical purposes the same as those involved in the instant case. Petitioner respectfully submits that this Court's reasoning improperly denies to him the benefit of a sound and valuable Tax Court precedent which shows the imposition of the tax to have been contrary to law.

Second: Granting that estate and gift taxes are in pari materia and that the laws must be construed together, the holding in *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, is otherwise inapplicable. That case dealt with a pure gift and the question as to when it became complete and taxable. Here we are dealing with a transfer, bona fide and for value unless Congress has completely ruled out marital rights as a money's worth consideration. This Court's opinion apparently concedes the issue to be thus limited. The trial judge found that "these transactions between the parties were in good faith, for business reasons, and not an attempt to evade or avoid taxes".[2] In the *Sanford* case the opinion was unanimous: Chief Justice Stone delivered it. In the instant case he is among those dissenting.

The "guiding light" here should be the intent of Congress with respect to inter vivos transactions involving dower and marital rights. The lawmakers made specific reference to such rights in the 1932 Revenue Bill and the explanatory committee report. The different handling of the subject in Titles III and VI of that Act is significant. We believe those records show a clear purpose to differenti-

[1] Transcript of Record, pages 54-55.

[2] Transcript of Record, page 52.

ate between the relinquishment of such rights as a money's worth consideration in cases arising under the estate as distinguished from the gift tax law.

Until the recent decision in the instant case, the great weight of authority sustained our viewpoint. This Court concedes that correlation of the two laws still requires legislative intervention but would not this Court's decision have the effect of correlating them in advance of Congressional act?

Third: The dissenting opinion of Mr. Justice Reed is sound, for the reasons therein stated, and should be adopted as the opinion of this Court.

Respectfully submitted,

SAM R. MARKS,
Attorney for Petitioner.

FRANCIS M. HOLT,
HARRY T. GRAY,
Of Counsel.

I, Sam R. Marks, attorney for petitioner in above case do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated at Jacksonville, Florida, this March 12th, 1945.

SAM R. MARKS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 126.—October Term, 1944.

Charles E. Merrill, Petitioner, vs. John L. Fahs, United States Collector of Internal Revenue for the District of Florida.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 5, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a companion case to *Commissioner* v. *Wemyss*, No. 629, just decided.

On March 7, 1939, taxpayer, the petitioner, made an antenuptial agreement with Kinta Desmare. Taxpayer, a resident of Florida, had been twice married and had three children and two grandchildren. He was a man of large resources, with cash and securities worth more than $5,000,000, and Florida real estate valued at $135,000. Miss Desmare's assets were negligible. By the arrangement entered into the day before their marriage, taxpayer agreed to set up within ninety days after marriage an irrevocable trust for $300,000, the provisions of which were to conform to Miss Desmare's wishes. The taxpayer was also to provide in his will for two additional trusts, one, likewise in the amount of $300,000, to contain the same limitations as the *inter vivos* trust, and the other, also in the amount of $300,000, for the benefit of their surviving children. In return Miss Desmare released all rights that she might acquire as wife or widow in taxpayer's property, both real and personal, excepting the right to maintenance and support. The inducements for this agreement were stated to be the contemplated marriage, desire to make fair requital for the release of marital rights, freedom for the taxpayer to make appropriate provisions for his children and other dependents, the uncertainty surrounding his financial future and marital tranquility. That such an antenuptial agreement is enforceable in Florida is not disputed, *North* v. *Ringling*, 149 Fla. 739, nor that Florida gives a wife an inchoate interest in all the husband's property, contingent during his life but absolute upon death. Florida Statutes (1941) § 731.34; *Smith* v. *Hines*, 10 Fla. 258; *Henderson* v. *Usher*,

125 Fla. 709. The parties married, and the agreement was fully carried out.

On their gift tax return for 1939, both reported the creation of the trust but claimed that no tax was due. The Commissioner, however, determined a deficiency of $99,000 in taxpayer's return in relation to the transfer of the $300,000. Upon the Commissioner's rejection of the taxpayer's claim for refund of the assessment paid by him, the present suit against the Collector was filed. The District Court sustained the taxpayer, 51 F. Supp. 120, but was reversed by the Circuit Court of Appeals for the Fifth Circuit, one judge dissenting. 142 F. 2d 651. We granted certiorari in connection with *Commissioner* v. *Wemyss*, *supra*, and heard the two cases together. 323 U. S. —.

This case, unlike the *Wemyss* case, does not come here by way of the Tax Court. No aid can therefore be drawn from a prior determination by the tribunal specially entrusted with tax adjudications. *See* Griswold, The Need for a Court of Tax Appeals (1944) 57 Harv. L. Rev. 1153, 1173. But like the *Wemyss* case, this case turns on the proper application of § 503 of the Revenue Act of 1932, 47 Stat. 169, 247, 26 U. S. C. § 1002. In the interest of clarity we reprint it here. "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year." Taxpayer claims that Miss Desmare's relinquishment of her marital rights constituted "adequate and full consideration in money or money's worth." The Collector, relying on the construction of a like phrase in the estate tax, contends that release of marital rights does not furnish such "adequate and full consideration".

We put to one side the argument that in any event Miss Desmare's contingent interest in her husband's property had too many variables to be reducible to dollars and cents, and that any attempt to translate it into "money's worth" was "mere speculation bearing the delusive appearance of accuracy". *Haines* v. *United States*, 276 U. S. 487, 494. We shall go at once to the main issue.

The guiding light is what was said in *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 44. "The gift tax was supplementary

to the estate tax. The two are in *pari materia* and must be construed together." The phrase on the meaning of which decision must largely turn—that is, transfers for other than "an adequate and full consideration in money or money's worth"—came into the gift tax by way of estate tax provisions. It first appeared in the Revenue Act of 1926. Section 303 (a) (1) of that Act, 44 Stat. 9, 72, allowed deductions from the value of the gross estate of claims against the estate to the extent that they were *bona fide* and incurred "for an adequate and full consideration in money or money's worth". It is important to note that the language of previous Acts which made the test "fair consideration" was thus changed after courts had given "fair consideration" an expansive construction.

The first modern estate tax law had included in the gross estate transfers "in contemplation of, or intended to take effect in possession or enjoyment at, death, except "a bona fide sale for a fair consideration in money or money's worth". Section 202 (b), Revenue Act of 1916, 39 Stat. 756, 777. Dower rights and other marital property rights were intended to be included in the gross estate, since they were considered merely an expectation, and in 1918 Congress specifically included them. Section 402 (b), 40 Stat. 1057, 1097. This provision was for the purpose of clarifying the existing law. H. Rep. No. 767, 65th Cong., 2d Sess., p. 21. In 1924 Congress limited deductible claims against an estate to those supported by "a fair consideration in money or money's worth", § 303 a (1), 43 Stat. 253, 305, employing the same standard applied to transfers in contemplation of death. H. Rep. No. 179, 68th Cong., 1st Sess., pp. 28, 66. Similar language was used in the gift tax, first imposed by the 1924 Act, by providing, "Where property is sold or exchanged for less than a fair consideration in money or money's worth" the excess shall be deemed a gift. Section 320, 43 Stat. 253, 314.

The two types of tax thus followed a similar course, like problems and purposes being expressed in like language. In this situation, courts held that "fair consideration" included relinquishment of dower rights. *Ferguson* v. *Dickson*, 300 Fed. 961, and see *McCaughn* v. *Carver*, 19 F. 2d 126; *Stubblefield* v. *United States*, 6 F. Supp. 440. Congress was thus led, as we have indicated, to substitute in the 1926 Revenue Act, the words "adequate and full consideration" in order to narrow the scope of tax exemptions. See *Taft* v. *Commissioner*, 304 U. S. 351, 356. When the gift tax was re-enacted in the 1932 Revenue Act, the

restrictive phrase "adequate and full consideration" as found in the estate tax was taken over by the draftsman.

To be sure, in the 1932 Act Congress specifically provided that relinquishment of marital rights for purposes of the estate tax shall not constitute "consideration in money or money's worth". The Committees of Congress reported that if the value of relinquished marital interests "may, in whole or in part, constitute a consideration for an otherwise taxable transfer (as has been held so), or an otherwise unallowable deduction from the gross estate, the effect produced amounts to a subversion of the legislative intent . . . ." H Rep No 708, 72d Cong., 1st Sess., p. 47; S. Rep. No. 665, 72d Cong., 1st Sess., p. 50. Plainly, the explicitness was one of cautious redundancy to prevent "subversion of the legislative intent." Without this specific provision, Congress undoubtedly intended the requirement of "adequate and full consideration" to exclude relinquishment of dower and other marital rights with respect to the estate tax. *Commissioner* v. *Bristol*, 121 F. 2d 129; *Sheets* v. *Commissioner*, 95 F. 2d 727.

We believe that there is every reason for giving the same words in the gift tax the same reading. Correlation of the gift tax and the estate tax still requires legislative intervention. *Commissioner* v. *Prouty*, 115 F. 2d 331, 337; Warren, Correlation of Gift and Estate Taxes (1941) 55 Harv. L. Rev. 1; Griswold, A Plan for the Coordination of the Income, Estate and Gift Tax Provisions (1942) 56 Harv. L. Rev. 337. But to interpret the same phrases in the two taxes concerning the same subject matter in different ways where obvious reasons do not compel divergent treatment is to introduce another and needless complexity into this already irksome situation. Here strong reasons urge identical construction. To hold otherwise would encourage tax avoidance. *Commissioner* v. *Bristol*, *supra* at 130; 2 Paul, Estate and Gift Taxation (1942) p. 1118. And it would not fulfill the purpose of the gift tax in discouraging family settlements so as to avoid high income surtaxes. H Rep. No. 708, 72d Cong., 1st Sess., p. 28; S. Rep. No. 665, 72d Cong., 1st Sess., p. 40. There is thus every reason in this case to construe the provisions of both taxes harmoniously. *Estate of Sanford* v. *Commissioner*, *supra*.[1]

Mr. Justice ROBERTS dissents.

[1] Treasury Regulation 79 (1936 ed.) Art. 8 is inapplicable. To find that the transaction was "made in the ordinary course of business" is to attribute to the Treasury a strange use of English.

Mr. Justice REED, dissenting.

This case differs from *Commissioner* v. *Wemyss*, No. 629, decided today. Whether the transferor of the sums paid for the release of dower and other marital rights, received adequate and full consideration in money and money's worth is a question of fact. The agreement recites that the parties contemplate marriage and provides that the trust shall be set up only in the event of and following the marriage. Petitioner was obligated to create the trust upon consideration of the relinquishment of marital rights and did so, and hence this is not a case involving marriage alone as consideration. Through the tables of mortality, the value of a survivor's right in a fixed sum receivable at the death of a second party may be adequately calculated. By adopting present value as the accepted future value, the uncertainty inherent in fluctuations of an estate's value is theoretically eliminated. The trial court thus found the present value of the release of the taxpayer's estate from the wife's survivorship rights largely exceeded the amount paid by the taxpayer and that the transactions between the parties were made in good faith for business reasons and not an attempt to evade or avoid taxes. Thus the District Court findings bring this transaction within the express language of the applicable Treasury Regulation.[1] *Merrill* v. *Fahs*, 51 F. Supp. 120. Its determination, we think, also makes it clear that the husband's estate received practical advantages of value in excess of the cost paid. *See Henderson* v. *Usher*, 125 Fla. 709, 727.

The question of the taxability as gifts of transfers to spouses in consideration of the release of marital rights had been a matter of dispute in courts before the passage of the Revenue Act of 1932,

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[1] Treasury Regulations 79 (1936 ed.):

"ART. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift."

§ 503, 47 Stat. 169, 247.[2] Congress in the 1932 act, § 504, declared that a transfer of marital rights should not be "consideration in 'money or money's worth'" under the estate tax provisions. Thus Congress put beyond any question the liability of transferors for estate taxes where marital rights were the consideration for the transfer. On the other hand, in the same 1932 Revenue Act the language of the gift tax section, § 503, did not have a provision forbidding the valuation of marital rights. Consequently, Sec. 503 as interpreted by Regulation 79, Art. 8, permits the treatment of the relinquishment of such rights, not donative in intent or effect, as "money's worth" consideration for property transferred. It seems to us clear that with the judicial history of the difficulties in estate and gift taxes as to the transfer of marital rights, when Congress expressly provided that relinquishment of dower, curtesy or other statutory estate was not "consideration" for estate tax purposes and left the gift tax provision without such a limitation, it intended that these rights be accorded a different treatment under these sections. This has been the determination of the Tax Court.[3]

In our view this judgment should be reversed.

The CHIEF JUSTICE and Mr. Justice DOUGLAS join in this dissent.

[2] Ferguson v. Dickson, 59 Fed. 961; McCaughn v. Carver, 19 F. 2d 124; Stubblefield v. United States, 6 F. Supp. 440.

[3] Bristol v. Commissioner, 42 B. T. A. 263; Jones v. Commissioner, 1 T. C. 1207; Wemyss v. Commissioner, 2 T. C. 876, 881.